No. 80-828

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

PACIFIC LEGAL FOUNDATION, a nonprofit California corporation; SENATOR JOHN V. BRIGGS, SENATOR WILLIAM CAMPBELL, SENATOR JOHN W. HOLMDAHL, SENATOR JOHN SCHMITZ, SENATOR OLLIE SPERAW, SENATOR BOB WILSON, ASSEMBLYMAN DENNIS BROWN, ASSEMBLYMAN WILLIAM H. IVERS, ASSEMBLYMAN ROSS JOHNSON, ASSEMBLYMAN WILLIAM LEONARD, ASSEMBLYMAN PATRICK J. NOLAN, ASSEMBLYMAN DON ROGERS, and ASSEMBLYMAN PHILLIP D. WYMAN, in their official capacities as members of the California State Legislature,

Petitioners,

v.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and PAUL DEFALCO, JR., in his official capacity as Regional Administrator for Region IX of the United States Environmental Protection Agency,

Respondents.

PETITION FOR WRIT OF CERTIORARI

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Petitioners

ANTHONY T. CASO
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTIONS PRESENTED

1. Can the Environmental Protection Agency (EPA) constitutionally refuse to process permits for the construction or modification of major pollution sources in certain areas of the state and threaten state legislators with the cutoff of certain federal financial assistance in unrelated programs unless and until legislation specified by the agency is enacted by the state legislature?

2. Can 42 U.S.C. § 7410(a)(2)(I), which requires state implementation plans (SIP) to contain a provision prohibiting construction or modification of certain major pollution sources, be read to impose automatically such a construction ban as a matter of law irrespective of the provisions of the applicable SIP?

3. Does the Clean Air Act permit EPA to impose sanctions on a state where the agency has made no finding that the nonattainment area plans submitted by the state are not in accordance with the requirements of the Act?

4. Can EPA effectively insulate its illegal activities from review by announcing them in interpretive rules?

5. Does 42 U.S.C. § 7604(a)(2), which grants the District Court jurisdiction to compel the Administrator to perform mandatory duties under the Clean Air Act, also grant jurisdiction to the District Court to hear challenges to actions that the Administrator has taken in lieu of performing his mandatory duties?

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No.

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OCTOBER TERM, 1980

PACIFIC LEGAL FOUNDATION, a nonprofit California corporation;* SENATOR JOHN V. BRIGGS, SENATOR WILLIAM CAMPBELL, SENATOR JOHN W. HOLMDAHL, SENATOR JOHN SCHMITZ, SENATOR OLLIE SPERAW, SENATOR BOB WILSON, ASSEMBLYMAN DENNIS BROWN, ASSEMBLYMAN WILLIAM H. IVERS, ASSEMBLYMAN ROSS JOHNSON, ASSEMBLYMAN WILLIAM LEONARD, ASSEMBLYMAN PATRICK J. NOLAN, ASSEMBLYMAN DON ROGERS, and ASSEMBLYMAN PHILLIP D. WYMAN, in their official capacities as members of the California State Legislature,

Petitioners,

v.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the United States Environmental Protection Agency; and PAUL DEFALCO, JR., in his official capacity as Regional Administrator for Region IX of the United States Environmental Protection Agency,

Respondents.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of California is reported at 14 E.R.C. 2121 and is reproduced as Appendix 1 to this petition. The opinion and modification thereof of the United States Court of Appeals for the Ninth Circuit is reproduced as Appendix 2.

*In compliance with Supreme Court Rule No. 28.1, Pacific Legal Foundation is a nonprofit, tax-exempt California corporation organized to litigate issues in the public interest. Pacific Legal Foundation is not affiliated with any other organization, corporate or otherwise, has no parent corporation, and neither owns nor controls any subsidiary corporations.

JURISDICTION

The decision, as modified by the United States Court of Appeals for the Ninth Circuit, in this case was rendered on August 27, 1980. The order of the Court of Appeals denying the petition for rehearing was issued on October 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the following constitutional, statutory, and regulatory provisions involved in this case is reproduced in the Appendix: Article IV, Section 4 of, and the Fifth and Tenth Amendments to, the United States Constitution; 42 U.S.C. §§ 7410, 7413, 7502, 7503, 7506, 7602, 7604, 7607, and 7616; Public Law No. 95-95, § 129(c) as amended by Public Law No. 95-190, § 14(b)(4); 44 Fed. Reg. 38471-38473 (1979); and 44 Fed. Reg. 57109-57117 (1979).

STATEMENT OF THE CASE

In 1977, Congress amended the Clean Air Act to allow areas of the country with particularly serious air pollution problems (nonattainment areas) an extension of time to meet the primary national ambient air quality standard for the various pollutants. Under the Act as amended, states with nonattainment areas were to submit nonattainment area plans (NAP) by January 1, 1979, that would achieve national air standards by December 31, 1982, or for areas with motor vehicle related air pollution problems that could not meet the 1982 deadline by December 31, 1987. 42 U.S.C. § 7502, Appendix 9 at A-72. If, however, a state failed to

submit an NAP by the statutory deadline, it then became the mandatory duty of the Environmental Protection Agency (EPA) to do so by July 1, 1979. 42 U.S.C. § 7410(c), Appendix 7 at A-47. The 1977 amendments to the Act also required existing state air plans to include a provision prohibiting construction or modification of major stationary sources of specified pollutants in nonattainment areas after July 1, 1979, unless the state had obtained EPA's approval of the NAP. 42 U.S.C. § 7410 (a)(2)(I), Appendix 7 at A-41-42. As of July 1, 1979, the California Air plan contained no such provision and California has not amended its plan since that time to include such a provision. On July 2, 1979, EPA published an *interpretive rule* in the Federal Register stating that it was EPA's position that the construction ban was to be applied automatically as a matter of law to all nonattainment areas without approved NAP's. 44 Fed. Reg. 38471 (1979), Appendix 17 at A-102.

Much of the State of California has been designated nonattainment for one or more pollutants. California did not, however, submit NAP's for any of these areas until long after the January 1, 1979, deadline. In fact, the first NAP was not submitted until July 5, 1979, and EPA has proposed to disapprove that plan. 44 Fed. Reg. 57109-57117 (1979), Appendix 18 at A-115. The primary objection of EPA to many of the NAP's submitted by California to date is the failure of the California State Legislature to enact a law mandating an annual motor vehicle emission control inspection and maintenance (I/M) program. Thus, EPA has applied the terms of the July 2, 1979, interpretive rule for the last 16 months to the State of California by refus-

ing to issue permits for the construction or modification of major stationary sources proposing to locate in nonattainment areas of the state.

In a telegram (reproduced as Appendix 19) to several members of the California State Legislature, David Hawkins, EPA's Assistant Administrator for Air, Noise, and Radiation, informed the Legislature that the prohibition on construction or modification of major stationary sources in California nonattainment areas would remain in effect until the Legislature enacted a law mandating an annual I/M program. The Hawkins telegram also threatened termination of certain federal financial assistance to California if the Legislature failed to make reasonable efforts toward the enactment of such a law.

In December, 1979, after 60-day notice to EPA required by 42 U.S.C. § 7604(b)(2) (Appendix 13 at A-85), petitioners Pacific Legal Foundation, a nonprofit California corporation organized to litigate issues in the public interest, and 13 named members of the California State Legislature brought suit in the United States District Court for the Eastern District of California alleging, *inter alia,* that respondent Douglas Costle, EPA Administrator, had failed to perform his mandatory duty under the Clean Air Act to promulgate NAP's for California nonattainment areas and further that respondent's use of the construction ban and threatened funding cutoff constituted an unconstitutional interference with the processes of the California State Legislature. Petitioners moved for a preliminary injunction to halt respondent's enforcement of the construction ban on December 21, 1979, which the District Court denied on

March 10, 1980, holding that the construction ban came within the jurisdictional requirements of 42 U.S.C. § 7607 (b)(1) (Appendix 14 at A-89) which limits review of regulations and final actions to the United States Court of Appeals for the appropriate circuit and, with regard to the threatened funding cutoff, that petitioners did not establish a probability of success on the merits. Appendix 1 at A-13-16; A-20. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court on August 27, 1980 (Appendix 2), and denied the petition for rehearing on October 2, 1980 (Appendix 3).

The jurisdiction of the District Court was invoked by petitioners under 42 U.S.C. § 7604(a)(2) (Appendix 13 at A-84) and 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I

THE ENVIRONMENTAL PROTECTION AGENCY HAS UNCONSTITUTIONALLY INTERFERED WITH THE PROCESSES OF THE CALIFORNIA STATE LEGISLATURE

Once again, this Court is faced with the task of determining the limits of the power of EPA under the Clean Air Act. In *EPA v. Brown,* 431 U.S. 99 (1977), the issue before this Court was the agency's assertion of power to place the state treasury into a receivership and to hold state officers in contempt for failure to enact laws in accordance with the agency's demands. *See id.* at 101-02. When this Court agreed to hear the case, however, EPA backed down from this position and conceded:

> " '[T]he necessity of removing from the regulations all requirements that the states submit legally adopted regulations; the [Administrator's] regulations contain no requirement that the state adopt laws.' " *Id.* at 103.

In *Pacific Legal Foundation v. EPA,* 534 F.2d 150 (9th Cir. 1976), the agency claimed the power to halt the sale of gasoline in the five major regions of California. *Id.* at 152. Again, however, EPA backed down from its outlandish position when the issue was brought before this Court. *Pacific Legal Foundation v. EPA,* 429 U.S. 990 (1976).

In this case, EPA claims the power to shut down construction and modification of major industrial facilities throughout most of California and to withhold more than $850 million in federal financial assistance from the state for the purpose of coercing the State Legislature to enact specific legislation. 44 Fed. Reg. 37679-37681 (1979), Appendix 17 at A-102. EPA's claim to such power is even more outrageous in light of the agency's failure to perform its own mandatory duties under the Clean Air Act to promulgate an air pollution control plan for California on July 1, 1979. 42 U.S.C. § 7410(c), Appendix 7 at A-47; Pub. L. No. 95-95, § 129(c) as amended by Pub. L. No. 95-190, § 14(b)(4), Appendix 16 at A-101. Had EPA complied with this mandatory duty, the need for any sanctions, constitutional or not, would have been obviated. *Compare* 42 U.S.C. § 7410(c) (Appendix 7) *and* Pub. L. No. 95-95, § 129(c) as amended by Pub. L. No. 95-190, § 14(b)(4) (Appendix 16) *with* 44 Fed. Reg. 38471-38473 (1979) (Appendix 17). EPA's crude attempts to extort legislation

from the California State Legislature demonstrates the agency's manifest contempt for our federal system of government and raises serious questions of constitutional law.

This Court held in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress could not regulate states *qua* states in such a manner that would impair the ability of the states to function effectively in the federal system. *Id.* at 852. *National League of Cities* presented this Court with the question whether Congress could mandate the wages and hours of state employees. This case presents the Court with the question of whether EPA can threaten to destroy portions of the state's economic base unless the State Legislature acts in the manner prescribed by the agency. Such actions by EPA implicate not only the reserved powers clause of the Federal Constitution (U.S. Const., Amend. X, Appendix 6), but also the constitutional guarantees of a republican form of government (U.S. Const., Art. IV, § 4, Appendix 4) and liberty (U.S. Const., Amend. V, Appendix 5).

In *Duncan v. McCall*, 139 U.S. 449 (1891), this Court stated:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies . . . ." *Id.* at 461. *See Brown v. EPA*, 521 F.2d 827, 838-39 (9th Cir. 1975), *vacated and remanded for consideration of mootness*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1977).

EPA's attempts to displace the citizens of California as the constituency of the State Legislature in this case cannot be allowed if we are to maintain a federal system of government. If, indeed, the Tenth Amendment reserves any power to the state governments and to the people of the states, it is the power of self-governance through the legislative process. To remain a viable entity in the federal system of government, the state must be able to exercise this power of self-governance free of undue coercion and extortion by unelected officials in the central government.

The conclusion that EPA is using the construction ban for the unconstitutional purpose of coercing the State Legislature is buttressed by the fact that the agency has yet to make a final determination regarding California's compliance with the 1977 amendments to the Clean Air Act. Section 7410(a)(2)(I) (Appendix 7 at A-41-42) of the Act provides only that the state air pollution plan contain a provision prohibiting, in certain circumstances, construction or modification of major stationary sources in nonattainment areas after July 1, 1979, *if* the state plan for those areas does not meet the requirements set out in the 1977 amendments to the Act. Not only does the California air pollution plan *not* include such a provision prohibiting construction or modification, but EPA, by its own admission, has made no final determination regarding California's compliance with the 1977 amendment to the Act. Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 5 (Appendix 20 at A-166). This point alone raises important questions of federal law that would justify granting the writ.

II

THE JURISDICTIONAL DETERMINATIONS OF THE COURT OF APPEALS AND DISTRICT COURT ARE IN CONFLICT WITH THE PRIOR RULINGS OF THIS COURT

The jurisdictional issues in this action also raise important questions regarding interpretation of the Clean Air Act and application of principles of administrative law. In affirming the conclusion of the District Court that jurisdiction over the issues raised by the motion for preliminary injunction lies solely in the United States Court of Appeals for the District of Columbia Circuit, the Ninth Circuit relied on the District Court's characterization of the construction ban as a "final action" of the Administrator. Appendix 2 at A-28. Petitioners contend, however, that the Ninth Circuit's characterization of the construction ban as a "final action" conflicts with the definition given to that term by this Court in *Harrison v. PPG Industries, Inc.*, ... U.S. ...., 64 L. Ed. 2d 525 (1980).

In *PPG,* this Court stated:

> "It is undisputed that the Administrator's ruling represented EPA's final determination . . . . Short of an enforcement action. EPA has rendered its last word on the matter." *PPG,* 64 L. Ed. 2d at 534.

In the instant action, however, EPA has still more to do prior to an enforcement action. Applications for permits to construct or modify a major stationary source must still be submitted to EPA and the agency must still make factual determinations with regard to each permit application prior to the decision of whether to issue the permit, to issue a

conditional permit, or to refuse to issue a permit. *See* 44 Fed. Reg. 37679-37681 (1979). Thus, although the *announcement* of the construction ban may have been a "final action," the *fact* of the construction ban consists of a *multitude* of actions. The District Court, therefore, had jurisdiction over the motion for preliminary injunction against the construction ban under its federal question jurisdiction (28 U.S.C. § 1331) and under traditional equity jurisdiction. Further, since EPA is using the construction ban as a means of coercing the California State Legislature to enact laws in lieu of the agency's performance of its mandatory duties under the Clean Air Act, the District Court also had jurisdiction under 42 U.S.C. § 7604(a) (Appendix 13 at A-84) which gives that court jurisdiction to compel the Administrator to perform his mandatory duties under the Act.

The District Court gave an alternative rationale for the holding that it lacked jurisdiction over petitioners' motion for a preliminary injunction against the construction ban. The District Court reasoned that since EPA announced the construction ban in an interpretive rule that petitioners' challenge was, in actuality, seeking review of a regulation. Appendix 1 at A-13-14. Under the Clean Air Act, regulations are reviewable only in the United States Court of Appeals for the appropriate circuit. 42 U.S.C. § 7607(b) (1), Appendix 14 at A-89. The District Court thus gave substantive effect to an *interpretive* rule—a result clearly rejected by the prior rulings of this Court.

In *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979), this Court stated:

> "We need not decide whether these regulations are properly characterized as 'interpretive rules.' It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Id.* at 315.

Clearly, EPA did not follow the procedures required by Congress to promulgate a substantive regulation regarding the construction ban. Rather, EPA initially took the position that the construction ban was imposed automatically by operation of the statute:

> "The regulatory language tracks the language from the statute, and does not alter the legal requirements established there. Therefore, EPA finds that this is an interpretive rule for which notice and public procedure are unnecessary." 44 Fed. Reg. 38472 (1979), Appendix 17 at A-108.

A review of the sequence of events regarding the construction ban in this litigation is also instructive. In July of 1979, EPA published a notice and interpretive rule in the Federal Register claiming that the construction ban was imposed by operation of statute. EPA must have realized, however, that such an interpretation would make the construction ban subject to challenge in the District Court pursuant to the court's federal question jurisdiction. *See* 28 U.S.C. § 1331. Thus, in response to petitioners' motion for a preliminary injunction, EPA abandoned this interpretation of the statute. One would think that the interpretive rule rendering this now rejected interpretation would, perforce, also be rejected. Such was not the case however.

In order to remove jurisdiction from the District Court without renouncing the construction ban, EPA needed to be able to point to a regulation that was promulgated on or near July 1, 1979. Such a regulation would serve two purposes: (1) it would justify EPA's failure to issue any new source review permits to construct or modify a major stationary source; and (2) it would be unassailable in *any* Circuit Court of Appeals since the regulation was more than 60 days old. *See* 42 U.S.C. § 7607(b)(1), Appendix 14 at A-89. Thus, EPA claims that the July 2, 1979, interpretive rule—whose interpretations have been disavowed—had the substantive effect of imposing the construction ban.

Whether EPA intended all along for the interpretive rule to be applied substantively, and thus purposefully disregarded the procedural requisites of the Clean Air Act, or whether EPA simply misinterpreted the language of the Clean Air Act and "hijacked" the interpretive rule in a desperate effort to short circuit the instant litigation is of no legal consequence. It has been uniformly held that interpretive rules cannot be afforded substantive effect. *See, e.g., Chrysler,* 441 U.S. at 313-15; *Morton v. Ruiz,* 415 U.S. 199, 235 (1974). Nor can EPA, recognizing the obvious illegality of its attempts to give substantive effect to the interpretive rule rely on the "any other final action" language of 42 U.S.C. § 7607(b)(1). Congress never intended that provision of the Clean Air Act to operate as a shield for the illegal activities of EPA. Further, there is in fact, no final action. Only an announcement that sets policy for a multitude of future actions by the Administrator. It is

equally clear that the Clean Air Act does not allow for the imposition of a construction ban unless such a ban is provided for in the state implementation plan (42 U.S.C. § 7410(a)(2)(I), Appendix 7 at A-41-42) and no such provision appears in the California SIP.

Finally, at the root of the problem is the Administrator's failure to perform his mandatory duty to promulgate a revised air pollution control plan for the State of California. Had the Administrator performed this mandatory duty, any need or justification for the construction ban or the threat to withhold federal financial assistance from the state would have been obviated.

CONCLUSION

The recent trend of environmental legislation—whereby Congress enacts national policy and relies upon state resources for implementation—has led to an increasing tension between the states and the federal government. *See* Comptroller General, *Report to the Congress: Federal-State Environmental Programs—The State Perspective* (August 22, 1980). The Clean Air Act has given EPA both enormous responsibilities and enormous power. In its sometimes overzealous attempts to fulfill its responsibilities, EPA has abused the power entrusted to it by Congress. Clearly, this is the case in the instant action.

Congress envisioned the Clean Air Act as a program of federal and state cooperation. EPA, however, seems to believe it has the power to force a state to "cooperate." EPA has lost sight of the fact that ours is a federal system

of government with a division of powers between federal and state governments. EPA's actions in this case have made serious inroads into the states' right to legislate freely. The Court must grant the writ if the federal system of government is to be maintained.

Respectfully submitted,

RONALD A. ZUMBRUN
JOHN H. FINDLEY
COUNSEL OF RECORD
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Petitioners

ANTHONY T. CASO
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916)444-0154
Of Counsel

November, 1980

(Appendices follow)

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Appendix 1

United States District Court
Eastern District of California

No. Civil S-79-925 LKK

Pacific Legal Foundation, et al.,
Plaintiffs,

vs.

Douglas M. Costle, et al.,
Defendants.

[Filed March 10, 1980]

ORDER

This case involves the Byzantine intricacies of the Clean Air Act, 42 U.S.C. § 7401 et seq. Plaintiffs have moved for a preliminary injunction to prevent defendants from imposing upon California a limitation on construction in certain "nonattainment" areas or other sanctions for the state's alleged failure to comply with the Clean Air Act. Defendants moved to dismiss on jurisdictional grounds. Defendants' motion was not timely filed so as to permit it to be considered at the same time as the motion for preliminary injunction. Nevertheless, since probability of success on the merits is an essential factor to be considered in any motion for preliminary relief (See, e.g. *Benda v. Grand Lodge of Int's Ass'n* (9th Cir. 1978) 584 F.2d 308, 315), the court's jurisdiction is necessarily implicated. In any event, the court has the duty to consider its jurisdiction at all stages of the proceedings. *Mansfield, C.& L.M.R. Co. v. Swan* (1884) 111 U.S. 379.

I

BACKGROUND

Under the 1970 amendments to the Clean Air Act, 42 U.S.C. § 7401 et seq., the Administrator of the Environmental Protection Agency was responsible for establishing nationwide ambient air quality standards. 42 U.S.C. § 7409. Primary responsibility for meeting these standards, however, was placed upon the states, who were required to submit state implementation plans (SIP) to the Administrator for the implementation, maintenance, and enforcement of the air quality standards. 42 U.S.C. § 7410(a)(1). If the state failed to submit a SIP, or if the SIP failed to meet the statutory criteria, the Administrator was required to promulgate a plan for the state. 42 U.S.C. § 7410(c). The amendments also provided for compliance deadlines, but by 1976 it became apparent that the deadlines would not be met. Consequently, Congress again amended the Act in 1977, adding a new Part D to Title I of the Act. 42 U.S.C. § 7501-8.

Part D is applicable only to "nonattainment areas", that is areas that do not meet national ambient air quality standards. See 42 U.S.C. § 7407(d). Under Part D, the deadlines for meeting the air quality standards relative to most pollutants is extended through 1982, provided that states with nonattainment areas substantially revise their SIPs to ensure that the new compliance deadlines are met. 42 U.S.C. § 7502. The states were required to submit such revised SIPs by January 1, 1979; if the revisions met the requirements of the Act, they were to be approved by the EPA by July 1, 1979. See Pub. L. 95-95 § 129(c).

Among other multiple, diverse and complex requirements, the revised plans were required to provide that after June 30, 1979, ". . . no major stationary source shall be constructed or modified in any nonattainment area (as defined in Section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of Part D of this subchapter (relating to nonattainment areas); . . ." 42 U.S.C. § 7410(a)(2)(I). See also § 7502(a)(1). The Act further requires that the SIP contain a similar construction limitation to apply if the SIP is not being "carried out . . . in accordance with the requirements of this part." 42 U.S.C. § 7503(4), 42 U.S.C. § 7502(b)(6).

Part D also required that the nonattainment provisions of the revised SIPs must include written evidence that the state has adopted by "statute, regulation, ordinance or other legally enforceable document" a means "to implement and enforce" compliance with the revised SIPs. 42 U.S.C. § 7502(b)(10). While a state may seek to delay its timetable for meeting the national ambient air quality standards for two automobile related pollutants (ozone and carbon monoxide) until 1987, if it does so, it must adopt and establish a schedule for implementation of an automobile inspection and maintenance program (I/M). 42 U.S.C. § 7502(b)(11)(b).

Under the Act, failure of a state to submit the required revisions leads to at least two possible consequences. First, as indicated above, the Administrator "shall . . . promptly prepare and publish . . . regulations setting forth an implementation plan or portion thereof. . . ." 42 U.S.C. § 7410 (c)(1). Second, the Administrator may cut off various types of financial assistance if the states have not submitted the SIP revisions or made reasonable efforts toward submitting the revisions. 42 U.S.C. §§ 7606(a), 7616(b).

As of July 1, 1979, most states, including California, had not submitted revised SIPs, or incorporated the construction limitation provisions into their SIPs.[1] Apparently in recognition of this fact, the Administrator promulgated a self-described "interpretive rule" that purported to recognize that the construction limitation as a matter of law was in effect on July 1, 1979, in those states that had not submitted the required revisions. 44 F.R. 38471, to be codified at 40 CFR 52.24. The rule, according to the accompanying explanation provided by the EPA, defines or clarifies the Clean Air Act 1977 amendments which make the construction limitation "automatic and mandatory". "To the extent any particular state plan is alleged to allow construction after July 1 . . . to that extent the plan is disapproved and [the statute] and this interpretive rule impose the statutory restriction upon the state plan as a matter of law." 44 F.R. 38472. The Administrator found that the interpretive rule "is nationally applicable and is

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[1]Since July 1, SIP revisions for most of California's nonattainment areas have been submitted, but not yet approved by the EPA.

based on determinations of nationwide scope and effect." 44 F.R. 38473.

As noted, California had not submitted the required revised SIP by July 1, 1979. Further, the state had not adopted an I/M program. In response to questions raised by various California state officials, an assistant EPA administrator sent a telegram to State Senator John Briggs on September 7, 1979. This telegram stated that the construction limitation could not be terminated until approved SIP revisions were promulgated.[2] It further stated that California's SIP revisions would not meet the statutory criteria until an I/M program was adopted by the state. Finally, the telegram stated that absent reasonable efforts to satisfy the new requirements of the Act, the EPA would be required to initiate proceedings to cut off various federal financial grants to the state.

II

THE COMPLAINT

Plaintiffs, a nonprofit public interest law firm and several state legislators, filed this action on December 3, 1979, and subsequently amended their complaint. The amended complaint seeks an order requiring the Administrator to promulgate a revised SIP under 42 U.S.C. § 7410 (c)(1). The complaint alleges jurisdiction in the district

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[2]The telegram states that "Until there is an approved plan, the Act's required prohibition on construction or modification of major sources in California cannot be terminated. This prohibition must, under law, remain in effect from July 1, 1979, until such time as the requirements of Part D of the Act, including vehicle inspection and maintenance programs are approved."

court under the "citizen suit" provisions of the Clean Air Act, 42 U.S.C. § 7604(a) (". . . any person may commence a civil action . . . against the Administrator where there is alleged a failure of the Administrator to perform an act or duty under this Chapter which is not discretionary . . . The district courts shall have jurisdiction . . . to order the Administrator to perform such act or duty."). Additionally, jurisdiction is asserted under the federal question statute (28 U.S.C. § 1331), the mandamus statute (28 U.S.C. § 1361), and the Declaratory Relief Act (28 U.S.C. § 2201-2202).

The complaint alleges that the state did not meet the January 1, 1979, statutory deadline for SIP revisions, and thus the Administrator had a nondiscretionary duty to promulgate said revisions. The complaint then alleges a variety of "unlawful actions", primary of which is the fact that defendant "has imposed an area wide ban on the construction or modification of major stationary sources" without statutory authority, or validly promulgated regulation. This construction ban allegedly was imposed because the state failed to enact an I/M program. Aside from economic harm resulting from the construction ban, the imposition of the ban is allegedly an unconstitutional sanction for failure to adopt legislation, and unconstitutionally attempts to coerce the adoption of said legislation in violation of Article IV, section 4, the Fifth Amendment, and the Tenth Amendment of the Constitution.

Plaintiffs subsequently brought this motion for injunctive relief to bar the EPA from imposing the construction limitation or any other sanctions for California's failure

to enact, repeal, or amend its laws. As plaintiffs explained at oral argument, they are not at this time seeking an injunction requiring the Administrator to promulgate the SIP revisions.

At the very outset it is critical to the resolution of the jurisdictional issue raised by the case to carefully delineate what the complaint does and does *not* allege. The plaintiffs do not directly claim that the Clean Air Act or any part of it is unconstitutional. Thus, the complaint for declaratory relief seeks no declaration of the unconstitutionality of the statute. At oral argument the Court provided counsel with a list of six various characterizations of the complaint. A copy of the list is attached to this opinion as an appendix. The sixth possible variant characterized the complaint as alleging that the construction ban was imposed by the statute and thus the statute permitted unconstitutional coercion. The plaintiffs at oral argument in effect disavowed such a construction of their complaint and the Court will take the plaintiffs at their word.[3]

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[3]Actually the amended complaint itself is not so clear. At ¶ 33 plaintiffs allege "Defendant Costle is without statutory authority to impose such a ban." Likewise at ¶ 40 plaintiffs allege "Defendant Costle is without statutory power or authority to impose sanctions on the states or the people of the state, for the failure of the state legislature to enact legislation." In subsequent paragraphs, however, plaintiffs assert that if they are wrong and there is statutory authority to that degree, the statute is unconstitutional (See ¶¶ 47-49 of the complaint). It is the Court's opinion that in an appropriate case a straightforward attack upon the constitutionality of the statute would raise a serious question as to whether this court had federal question jurisdiction. Nonetheless throughout these proceedings plaintiffs have not asserted the alternative position. I wish to emphasize that I express no opinion as to where jurisdiction for such a challenge would lie.

Since the jurisdiction of this Court is implicated by the motion for injunctive relief (and in any event this Court has an obligation independent of counsel to examine its jurisdiction), I will address these issues first.

III

JURISDICTION

Two separate sections of the Act deal with jurisdiction. First, as noted, the "citizen suit" section provides any citizen with the right to bring an action in the district court to compel the Administrator to perform certain non-discretionary acts or duties. Thus, by its terms the Act waives sovereign immunity and establishes jurisdiction for such an action in the district court. The jurisdiction established is neither exclusive nor limited jurisdiction; indeed, a later section explicitly provides that the citizen suit provision does not restrict any other rights to bring an action against the Administrator. 42 U.S.C. § 7604(e).

By contrast, 42 U.S.C. § 7607(b)(1) sets up a complex web of exclusive jurisdiction to review various causes of action in various appellate courts. I quote this section in its entirety:

> (b)(1) *A petition for review of* action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section

7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or *any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title* or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) *or under regulations thereunder, or any other final action of the Administrator under this chapter* (including any denial or disapproval by the Administrator under subchapter I of this chapter) *which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.* Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. (Emphasis added.)

Subsection (e) of section 7607, which was added in 1977, laconically provides that "Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section."

Cases both subsequent and prior to the 1977 amendments conclusively establish the exclusive nature of § 7607(b)(1) jurisdiction. In other words, a district court is without jurisdiction to consider or otherwise review regulations or actions cognizable in the appellate courts pursuant to § 7607(b)(1). See, e.g. *U.S. Steel Corp. v. E.P.A.* (5th Cir. 1979) 595 F.2d 207; *Lubrizol Corp v. Train* (6th Cir 1976) 547 F.2d 310; *Anaconda Co. v. Ruchelshaus* (10th Cir. 1973) 482 F.2d 1301; *Environmental Defense Fund, Inc. v. Costle* (D.D.C. 1978) 448 F.Supp. 89; *Hagedorn v. Union Carbide Corp.* (N.D.W.Va. 1973) 363 F.Supp. 1061; Cf. *Inv. Co. Inst. v. Bd. of Gov. Fed. Reserve Sys.* (D.C.Cir. 1977) 551 F.2d 1270, 1279; But see *P.P.G. Industries, Inc. v. Harrison* (5th Cir. 1979) 587 F.2d 230, cert. granted .....U.S. .....[4]

The doctrine that § 7607(b)(1) places exclusive jurisdiction in an appropriate appellate court applies regardless of the theory or characterization of the action. Thus, if this action comes within § 7607(b)(1), the various bases

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[4]The courts have suggested that the purpose of this exclusive original appellate review is to avoid lengthy appeals and conflicting holdings by channeling all such petitions for review to a single appellate court, with appeal only to the Supreme Court. See e.g. *Lubrizol v. Train, supra* at 317. Since jurisdiction for local or regional objections rests with the appropriate regional court of appeals, this explanation is at best only a partially satisfactory rationalization.

for jurisdiction in the district court asserted by plaintiffs will not suffice to give this court jurisdiction to hear the matter. That is to say, original appellate review jurisdiction is exclusive and there is no concurrent district court jurisdiction under the citizen suit provision. See, e.g. *Environmental Defense Fund, Inc. v. Costle, supra* at 92. Similarly, exclusive jurisdiction under § 7607(b)(1) bars district court jurisdiction under either the federal question statute (28 U.S.C. § 1331), *Environmental Defense Fund, Inc. v. Costle, supra* at 92, n.10; or the Mandamus Act (28 U.S.C. § 1361), See *Kennecot Copper Co. v. Costle* (9th Cir. 1978) 572 F.2d 1349. The Declaratory Judgment Act (28 U.S.C. § 2201-2), of course, does not provide an independent jurisdictional basis. See, e.g. *Benson v. State Board of Parole* (9th Cir. 1967) 384 F.2d 238, cert. den. 391 U.S. 954.

Plaintiffs focus upon two types of "sanctions" allegedly imposed by the EPA: the construction limitation and a threatened cut off of federal funds. I now turn to these claims and examine them seriatum.

A. *The Construction Limitation*

Although plaintiffs ultimately seek an order requiring the Administrator to promulgate a SIP, the gist of the construction limitation claim is directed towards enjoining a construction limitation allegedly imposed by the Administrator. The interrelationship between the construction limitation claim and the duty to promulgate the revised SIP is based upon plaintiffs' claim that the construction limitation is invalid, in part, because of the Administrator's duty to promulgate a SIP.

Thus, even though plaintiffs style this action as a citizen's suit to compel the performance of a nondiscretionary duty, this Court will of necessity have to review the propriety of the construction limitation. Therefore, if the validity of the construction limitation is cognizable only in an action brought under § 7607(b)(1), then this Court is without authority to hear the matter.[5]

Defendant argues that the construction limitation comes within § 7607(b)(1) under several theories. Each will be examined in turn.

1. *The Construction Limitation As A Promulgation Of A Portion Of A SIP.*

Defendant first argues that since the ban was purportedly inserted into the then extant state plan, See 44 FR 38472, it is an "action in approving or promulgating any implementation plan under § 7410", and thus within the jurisdiction of the Court of Appeals under § 7607(b)(1).[6] The simplicity of defendant's solution is tempting, unfortunately additional analysis is required.

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[5]Here again the Court wishes to stress that plaintiffs do not argue that the construction ban is imposed automatically by the Act. On the contrary, plaintiffs allege "Defendant Costle is without statutory authority to impose such a ban." Complaint, ¶ 33. If plaintiffs wish to assert a statutory origin for the construction ban, different questions would be before this Court requiring briefing on the possibly equally excruciatingly complex problem of jurisdiction under that assertion.

[6]The fact that the construction limitation may be viewed as an amendment or revision of a plan rather than "a plan" appears to make no difference since under § 7410(c)(1) upon noncompliance the Administrator must "prepare . . . regulations . . . setting forth an implementation *plan or portion thereof.*" (Emphasis added.)

The EPA treated the insertion of the construction limitation as an "interpretive rule" asserting that in fact the limitation is imposed by statute.[7]

Plaintiffs, however, respond by saying (a) the statute does not impose the construction limitation, and (b) the interpretive rule cannot impose the limitation since an interpretive rule cannot have force or effect. The latter assertion relies on *Chrysler Corp. v. Brown* (1979) ..... U.S. ....., 60 L.Ed.2d 208. Thus they appear to argue the imposition of the construction limitation being without legislative or regulatory support is lawless.

The plaintiffs assert, in essence, that since the interpretive rule cannot impose the sanctions, the court may treat the issue as if the rule did not exist; accordingly, they argue they do not seek to review a regulation promulgating an amendment to a SIP.

Plaintiffs misconstrue the effect of labeling an act of an administrative agency an "interpretive rule." A rule does not cease to exist because it is "interpretive," nor is it true that once so labeled the rule cannot have "real world" consequences. Indeed, the rule found to be "interpretive" in *Chrysler v. Brown* "certainly affect[s] individual rights and obligations." *Chrysler Corp. v. Brown, supra* at 60 L.Ed.2d 226. The effect of determining that a rule is interpretive is that the court will not be required to give it

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[7]"Interpretive rules are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Chrysler Corp. v. Brown* (1979) .... U.S. ...., 60 L.Ed.2d 208, 225, n.31 quoting from "Attorney General's Manual on the Administrative Procedure Act."

the force and effect of law. Id. Thus if the "interpretive rule in fact had the effect of imposing or purporting to impose the limitation, it is the propriety of that regulation that is in issue and jurisdiction lies in the Court of Appeals.

Defendant asserts that, insofar as he did anything to impose the limitation he did it through the interpretive rule. Plaintiffs do not deny that the rule was the vehicle adopted by defendant to attempt, however unlawfully, to impose the limitation.[8] Even if plaintiffs are right and defendant had no power to impose the limitation through an interpretive rule, plaintiffs would perforce be attacking a regulation implementing § 7410, and thus jurisdiction is in the Court of Appeal under § 7607(b)(1).

In reality a proper characterization of plaintiffs' contention appears to be that they are attacking the construction limitation which is purportedly but allegedly unlawfully authorized or implemented by the rule, because, they argue, the rule being interpretive may not have the effect the EPA asserts it has.[9] The courts have made no distinction for jurisdictional purposes between substantive and interpretive rules. See, e.g. *Citizens to Save Spencer County v. EPA* (D.C.Cir. 1979) 600 F.2d 844, 875-876; *Environmental Defense Fund, Inc. v. Costle, supra* at 93.

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[8]It is important to recognize that plaintiffs assert that the Administrator imposed the ban. If the Administrator used some device other than the rule, such assertion appears nowhere in the documents before the Court. See 2, infra.

[9]Even if the rule does not, by its terms, impose a construction limitation, it would still appear to come within § 7607(b)(1) as a "nationally applicable regulation."

See also *Inc.Co.Inst. v. Bd. of Gov. Fed. Reserve Sys., supra* at 1276-1277. Thus review of the rule, whether interpretive or not, appears to be limited to the Courts of Appeal.[10]

2. *Final Action*

Defendant also asserts that even if the interpretive rule was not the promulgation of a regulation or revised SIP, jurisdiction nevertheless is in the Court of Appeals since the imposition of the construction limitation is " . . . any other final action of the administrator under this chapter." 42 U.S.C. § 7607(b)(1). In part resolution of this issue may be factual, and its determination difficult because the parties have failed to provide the Court with a proper factual predicate.[11] If, as plaintiffs assert the "interpretive rule" does not impose the limitation, how is it accomplished? Plaintiffs have not informed the Court.

If plaintiffs are suggesting that some other action by the Administrator imposed the limitation, they have not identified it. If plaintiffs are suggesting that no construction limitation has been imposed, they have not so alleged in their complaint. Indeed, such an assertion appears to be at odds with the record, and would raise questions of ripeness.

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[10]Since the Administrator made a finding of nationwide scope and effect, it would appear that the District of Columbia Circuit Court of Appeals is the proper forum for review of the rule. See 42 U.S.C. § 7607(b)(1).

[11]The failure to provide the court with the factual predicate would be enough to defeat plaintiffs' motion for a preliminary injunction.

In any event, assuming that the limitation is in place, assuming as plaintiffs assert that the Administrator was the source of the limitation, in some fashion it was accomplished. Whatever action it was, under the elusive record before me I can only conclude that it was accomplished through a final action. Indeed, even were this not the case, jurisdiction cannot be presumed (*Norton v. Lowrey* (1925) 266 U.S. 511), and it has long been established that the party invoking district court jurisdiction has the burden of demonstrating jurisdiction. *Turner v. Bank of N. America* (1799) 441 Dall 7, 1 LE 718.

Thus it appears that whether the construction limitation is viewed as a revision of a plan, a regulation, or as an action of the Administrator, this Court is without jurisdiction to review it.

B. *Other Sanctions*

Plaintiffs' complaint also alleges that the EPA threatened to impose other sanctions if the state did not pass certain legislation. Plaintiffs allege that this threat is itself coercive conduct that violates state sovereignty and thus various constitutional provisions. Since the EPA has not yet acted on these threats, it is clear and uncontested that section 7607(b)(1) simply does not apply. Since this particular claim does not raise any particular nondiscretionary duty, it is likewise clear that the Citizen Suit provisions do not apply. Since no provision of the Clean Air Act allocates jurisdiction for this claim, it would appear to be cognizable under the federal question statute, 28 U.S.C. § 1331.

Defendant argues, however, that, since the Administrator has not yet acted, this matter is not ripe for review. This argument simply misses the point of plaintiffs' claim. The *threat itself,* not any potential action, is the harm plaintiffs seek to avoid. Since plaintiffs allege that the threat itself violates the constitution by coercing the legislature to act so as to avoid a threatened harm, this claim appears to be ripe.

Moreover, to style this claim "unripe" would be to bar review at the only time review might be meaningful. If the threat is effective, then, under defendant's theory, the action would never be ripe, or judicial review, limited or futile as it would be, would only be available after the constitutional violation is completed. The essence of the claim, after all, is that the defendant is coercing the state legislature into the adoption of certain legislation. If the legislature succumbs, defendant would be faced with the nearly impossible task of overcoming the doctrine which forbids the court from examining legislative motivation. *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252; *McGinnis v. Royster* (1973) 410 U.S. 263; *U.S. v. O'Brien* (1968) 391 U.S. 367. The doctrine of ripeness is a method of insuring, among other matters, a case and controversy; clearly it cannot reasonably be applied to put the matter beyond practical review forever.

If all plaintiffs argued was that the EPA has no power to impose sanctions, then a ripeness argument might be valid. Here, on the other hand, plaintiffs challenge the constitutionality of the threat itself, not merely whether

or not the EPA has the power to follow through with the threat.

C. *Conclusion On Jurisdiction*

The crazy quilt allocation of jurisdiction under the Clean Air Act must inevitably leave litigants and judges puzzled and disgruntled. Nonetheless, as is sometimes the case, whatever a judge's view of the wisdom of a statute, he is bound to enforce it. Plaintiffs' ingenious effort to avoid the jurisdictional trap by characterizing its challenge of the construction limitation as a suit to require the Administrator to perform a mandatory duty and thus get on with the litigation on the merits must, unfortunately, be rejected.

I am compelled to the conclusion that insofar as plaintiffs challenge the imposition of a construction limitation *by the Administrator*, this claim is not cognizable in this court and must be dismissed. Insofar as an examination of any alleged duty of the Administrator to promulgate SIP revisions raises the validity of the construction limitation, then it too is not properly before this court. To rule otherwise would be to allow any plaintiff to avoid the strictures of § 7607(b)(1) merely by seizing upon some allegedly nondiscretionary duty that implicates the validity of action otherwise reviewable solely by an appellate court. Whatever this court's feelings as to the wisdom of the jurisdictional framework set up in the Clean Air Act, that framework forbids such a result.

On the other hand, it appears clear that jurisdiction lies with this court to review the constitutionality of the coercive nature of the threat to cut off funds.

IV

INJUNCTIVE RELIEF

Although plaintiffs' motion for preliminary relief seeks to enjoin the threat of the imposition of "sanctions" if the state does not pass certain legislation, the only sanction other than a construction limitation that has been identified is the possibility of cutting off federal funds pursuant to 42 U.S.C. §§ 7506, 7616. Indeed, the telegram sent by the EPA raised just this spectre if the state failed to pass an I/M program.

Plaintiffs claim that the threat of this funding cut-off constitutes unconstitutional coercion of the state legislature which violates the Tenth Amendment, the guarantee of a republican form of government in Article IV, Sec. 4, and a Fifth Amendment due process interest. Even assuming arguendo that plaintiffs have standing to raise these constitutional claims, I find that injunctive relief is not justified since there is virtually no change of succeeding on the merits of this claim.

Plaintiffs rely on two authorities, neither of which controls the instant case. First, *National League of Cities v. Usury* (1976) 426 U.S. 833, which established a limit to commerce clause regulation that directly displaced "the State's freedom to structure integral operations in areas of traditional government functions", Id. at 852, expressly did not reach actions based on the spending power. Id. 852,n.17. Second, *Brown v. EPA* (9th Cir. 1975) 521 F.2d 827, vacated and remanded, 431 U.S. 99 (1977), on remand 566 F.2d 665, which barred certain sanctions directly imposed on the state including injunctive relief, imposition of a receivorship on state functions, and civil contempt of

state officials, also involved the permissible extent of commerce power, not spending power. See 521 F.2d at 840.

It is clear that both cases involved direct interference with state sovereignty: in *Usury,* the imposition of federal employment requirements on the state as an employer, in *Brown,* the virtual assumption of state sovereignty by the EPA. In both cases, the state had no choice but to comply.

In the present case, by contrast, the threatened cut-off of federal funds comes within the classic "carrot and stick" spending power condition that has long been upheld. See, e.g. *Steward v. Davis* (1936) 301 U.S. 548. In such cases the state is free to reject federal money and thus free to reject the conditions connected with its acceptances. Cases subsequent to both *Usury* and *Brown* have continued to uphold this type of spending power conditioned benefit. See e.g. *Texas Landowners Rights Ass'n v. Harris* (D.D.C. 1978) 453 F.Supp. 1025, 1029-1030, aff'd 598 F.2d 311; *Montgomery County Md. v. Califano* (D.Md. 1978) 449 F.Supp. 1230, 1247-1249, aff'd 599 F.2d 1048; *State v. Califano* (E.D.N.C. 1977) 445 F.Supp. 532, 535-536, aff'd mem.opn. 435 U.S. 962.

The present case is indistinguishable from this line of cases. At most, the EPA has threatened to cut off federal funds, as it is empowered to by statute, if the state does not pass legislation required by the same statute. Far from being unconstitutional coercion, the "express conditioning of federal aid" has "unquestioned constituitonal validity." *Shell Oil v. Train* (9th Cir. 1978) 585 F.2d 408, 413-414.

V

ORDER

It is therefore ordered that:

1. Plaintiffs' motion for preliminary injunction is denied.

2. The parties are directed to attend a Status Conference in Chambers on March 24, 1980, at 3:30 p.m.

Dated: March 10, 1980

/s/ LAWRENCE K. KARLTON

Lawrence K. Karlton
Judge, U.S. District Court

CONSTRUCTION BAN

There appear to be six possible assertions concerning jurisdiction which can be made about the construction ban.

I. THE CONSTRUCTION BAN IS IMPOSED BY REGULATION

A. The regulation does not conform to the statute:

There is no jurisdiction in the district court because so characterized this does not raise an issue of the failure of the administrator to perform a duty that is not discretionary under Section 304(a)(2) of the Clean Air Act, 42 U.S.C. 7604, but is:

(1) A petition to review action of the Administrator in promulgating "nationally applicable regulations" under 42 U.S.C. 7607(b)(1) and is thus under the jurisdiction of the Court of Appeals for the District of Columbia or

(2) If locally or regionally applicable only, jurisdiction is in the Ninth Circuit under the same section.

B. If the plaintiffs are only attacking the *finding* by the EPA as to the national scope, this again would appear to be within the D.C. Circuit (i.e. the finding is an act 42 U.S.C. 7607(b)(1)).

II. THE REGULATION IS A REVISION OF A STATE SIP

A. If regional, it is a petition for review of action in promulgating an implementation plan under Section 110 of the Clean Air Act, 42 U.S.C. § 7410, and thus is in the Ninth Circuit under 42 U.S.C. § 7607(b)(1). Or, since the

regulation states it is nationwide, it would again appear to be in the D.C. Circuit under 42 U.S.C. § 7607(b)(1).

III. THE REGULATION IS AN EPA SIP

Jurisdiction is in the D.C. Circuit if national — in the Ninth Circuit if regional.

IV. NO HEARING

If it is an attack on the regulation in that the regulation is not in fact an interpretive regulation, but has the force of law and thus must be adopted pursuant to Section 7607(d) (Section 307d of the Clean Air Act), although a citizen may sue for the EPA's doing nothing when it has a duty to do something, § 7604(a)(2) (Section 304(a)(2) of the Clean Air Act) here, in reality plaintiff's are attacking the regulation because no hearing has been held and thus it would appear that jurisdiction is in the D.C. Circuit under the specific statutory grant of jurisdiction under Section 7607(b)(1).

V. IF THE REGULATION IS IN FACT INTERPRETIVE

If the plaintiffs are claiming that since the regulation is in fact interpretive, and thus no action may be accomplished relying on it, then they seek review of an action and again jurisdiction is either in the D.C. Circuit or the Ninth Circuit under § 7607(b)(1).

VI. IMPOSED BY STATUTE

If the assertion is that the construction ban is in fact imposed by the statute and the statute is unconstitutional, then and only then does it appear that jurisdiction is in

the district court. That is because it would be under our general federal question jurisdiction, given the fact that there is no specific grant of exclusive power to hear such cases to anyone else.

Appendix 2

United States Court of Appeals
For the Ninth Circuit

No. 80-4108

Pacific Legal Foundation, a nonprofit California corporation; Senator John V. Briggs, Senator William Campbell, Senator John W. Holmdahl, Senator John Schmitz, Senator Ollie Speraw, Senator Bob Wilson, Assemblyman Dennis Brown, Assemblyman William H. Ivers, Assemblyman Ross Johnson, Assemblyman William Leonard, Assemblyman Patrick J. Nolan, Assemblyman Don Rogers, and Assemblyman Phillip D. Wyman, in their official capacities as members of the California State Legislature,

Plaintiffs-Appellants,

vs.

Douglas M. Costle, in his official capacity as Administrator of the United States Environmental Protection Agency; and Paul DeFalco, Jr., in his official capacity as Regional Administrator for Region IX of the United States Environmental Protection Agency,

Defendants-Appellees.

[Filed Aug. 12, 1980]

OPINION

Appeal from the United States District Court
for the Eastern District of California

Submitted June 17, 1980

Before: SNEED and POOLE, Circuit Judges, and
ZIRPOLI*, District Judge

Per Curiam:

Plaintiffs-appellants, a nonprofit law firm and several California state legislators, appeal from the denial of their motion for a preliminary injunction to restrain the defendant-appellee from enforcing a ban on the construction or modification of certain sources of air pollution in California and from penalizing the state for its failure to enact anti-pollution laws in accordance with agency demands. Appellants based this motion on allegations that the Environmental Protection Agency (EPA) has failed to perform its nondiscretionary duty to promulgate regulations that would obviate the need for the construction ban, and that the agency is using unconstitutional methods to coerce the California legislature to act. The district court denied the motion. It held that it had no jurisdiction to consider the statutory claim and that the constitutional claim was almost certainly without merit. Our jurisdiction rests on 28 U.S.C. § 1292(a)(1) (1976). We affirm the district court's denial of the motion.

The Clean Air Act, 42 U.S.C. § 7401 *et seq.* (Supp. II 1978), requires each state to draw up for the EPA's approval a state implementation plan (SIP), or a revision in the light of recent Clean Air Act amendments, confirming the adoption of state legislative and executive measures for enforcing national air quality standards announced by the EPA. Appellants contend that, if a state had not submitted an acceptable SIP by January 1, 1979, the EPA

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*Honorable Alfonso J. Zirpoli, Senior United States District Judge for the Northern District of California, sitting by designation.

should have "promptly," and at the latest within six months, promulgated its own SIP for the state, unless the state had adopted and submitted a satisfactory SIP in the meantime. *Id.* § 7410(c)(1); Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 129(c), 91 Stat. 750-51 (1977). Many states have now failed to meet new deadlines for the submission of SIPs set by the 1977 amendments. On July 1, 1979—the date by which the EPA was to have approved or rejected any SIPs submitted by January 1, 1979—the EPA published what it designates as an "interpretive" rule that imposes a construction ban. It provides that after June 30, 1979, the last day for EPA approval of state-submitted SIPs, no major stationary source of pollution may be constructed or modified in a highly polluted, "nonattainment" area to which an SIP applies unless the SIP meets certain requirements. 44 Fed. Reg. 38471 (July 2, 1979).

The 1977 amendments give the EPA another means of inducing the states to do their part. The EPA may disapprove projects and cut off grants under the various air pollution statutes if a state has neither submitted a timely, satisfactory SIP nor made "reasonable efforts" toward that end. 42 U.S.C. § 75065 (Supp. II 1978).

California missed the January 1, 1979 deadline for submitting a revised SIP. On September 7, 1979 an EPA official telegraphed a state senator that the construction ban would continue until California's revised SIP was approved, and that the EPA would begin cutting off the federal funds it administers unless California soon made reasonable efforts to comply with the Clean Air Act requirements, one of which is enactment by the state of leg-

islation to enforce anti-pollution measures in the highly polluted areas.

The Clean Air Act sets up a special jurisdictional scheme for review of EPA actions. 42 U.S.C. § 7607(b)(1), (e) (Supp. II 1978). It confers jurisdiction on the courts of appeals in several specified circumstances, but the list is not exhaustive. Section 7604 empowers the district courts "to order the Administrator to perform . . . any act or duty under this chapter which is not discretionary. . . ." *Id.* § 7604(a). Appellants rely on section 7604 to provide district court jurisdiction with respect to their claim that the EPA should have promulgated its own SIP for California. The district court held without prejudice to the other issues in the case, that the citizen suit jurisdiction provided by section 7604 does not provide a basis for the motion to suspend the ban. This motion, the district court held, questions final agency action reviewable only in the courts of appeals under section 7607(b)(1). Federal question jurisdiction, 28 U.S.C. § 1331 (1976), however, permits appellants' constitutional attack on the EPA's use of funding sanctions, the district court concluded. That attack was held to be virtually without merit. For these reasons the district court denied the motion.

Our standard of review in cases of this type has been stated many times. Under that standard the denial of a preliminary injunction is within a district court's discretion, even when the balance of hardships tips sharply in the movant's favor, unless the suit for a permanent injunction can be said to raise serious questions or has a fair chance of success on the merits. *Benda v. Grand Lodge of*

International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). We hold that in this case neither the likelihood that there was jurisdiction to hear the statutory challenge nor the likelihood that the constitutional challenge, for which jurisdiction existed, would be successful suffices to require that we direct the district court to grant appellants' motion for a preliminary injunction.

Affirmed.

United States Court of Appeals
For the Ninth Circuit

No. 80-4108

Pacific Legal Foundation, et al.,
Plaintiffs-Appellants,
vs.
Douglas M. Costle, et al.,
Defendants-Appellees.

[Filed Aug. 27, 1980]

ORDER

Before: SNEED and POOLE, Circuit Judges and ZIRPOLI, District Judge*

The per curiam opinion filed on August 12, 1980 is hereby redesignated an opinion authored by Judge Sneed.

*Honorable Alfonso J. Zirpoli, Senior U.S. District Judge from the Northern District of California, sitting by designation.

Pacific Legal Foundation, et al. v. Douglas M. Costle, et al.,

No. 80-4108

[Filed Aug. 27, 1980]

POOLE, Circuit Judge, concurring:

I concur in the judgment affirming the district court's denial of appellants' motion for a preliminary injunction, but on a somewhat different basis.

With respect to their challenge to the construction moratorium, I would affirm on the ground that the district court correctly concluded that it lacked jurisdiction over that challenge,[1] substantially for the reasons stated in that court's opinion. The "citizen suit" to compel performance of the EPA's purportedly nondiscretionary duty to promulgate a SIP for California, for which jurisdiction was asserted under 42 U.S.C. § 7604, was merely incidental to the challenge to the construction ban, at least at this stage of the proceedings. Whether the ban was imposed by the interpretive rule or the EPA telegram to the state legislators, appellants were seeking review of either the promulgation of a portion of an implementation plan or other

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[1]I concur, instead of joining with the majority, because it seems to me that the threshold question is not whether there was a *likelihood* of jurisdiction to hear this challenge, but whether the district court did or did not have such jurisdiction. Subject matter jurisdiction is a question of law, not a matter of discretion. If the district court did have jurisdiction, its denial of the preliminary injunction for lack of jurisdiction would have constituted an erroneous legal premise, and that would be a basis for reversal. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975); *Douglas v. Beneficial Finance Co.*, 469 F.2d 453, 454 (9th Cir. 1972).

"final action" of the Administrator within the meaning of 42 U.S.C. § 7607(b)(1), as broadly defined in *Harrison v. PPG Industries, Inc.*, 100 S.Ct. 1889 (1980). Jurisdiction over this challenge, therefore, was exclusively in the court of appeals under that section and 42 U.S.C. § 7607(e).

As to the threatened funding cutoffs, the district court's conclusion that appellants had virtually no chance of succeeding on the merits was neither an abuse of discretion nor based upon erroneous legal premises. I would therefore also affirm the denial of preliminary injunctive relief on that ground. See *Miss Universe, Inc. v. Flesher,* 605 F.2d 1130, 1132-33 & n.5 (9th Cir. 1979); *Benda v. Grand Lodge, etc.*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979).

Appendix 3

United States Court of Appeals
For the Ninth Circuit

No. 80-4108

Pacific Legal Foundation, a nonprofit California corporation; Senator John V. Briggs, Senator William Campbell, Senator John W. Holmdahl, Senator John Schmitz, Senator Ollie Speraw, Senator Bob Wilson, Assemblyman Dennis Brown, Assemblyman William H. Ivers, Assemblyman Ross Johnson, Assemblyman William Leonard, Assemblyman Patrick J. Nolan, Assemblyman Don Rogers, and Assemblyman Phillip D. Wyman, in their official capacities as members of the California State Legislature,

Plaintiffs-Appellants,

vs.

Douglas M. Costle, in his official capacity as Administrator of the United States Environmental Protection Agency; and Paul DeFalco, Jr., in his official capacity as Regional Administrator for Region IX of the United States Environmental Protection Agency,

Defendants-Appellees.

[Filed Oct. 2, 1980]

ORDER

Before: SNEED and POOLE, Circuit Judges, and ZIRPOLI*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

*Honorable Alfonso J. Zirpoli, Senior United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix 4

United States Constitution
Article IV, Section 4

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Appendix 5

United States Constitution
Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

Appendix 6

United States Constitution
Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Appendix 7

42 U.S.C. § 7410

(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as re-

quired in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan; (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources; (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pur-

suant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3) (C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to

concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of any such permit(not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under section 7410(f) or (g) of this title (relating to temporary energy or economic authority) or orders under section 7419 of this title (relating to primary nonferrous smelters) have been granted,

if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 7502(a)(2) of this title shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B) of this section.

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 7411 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purposes of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including

such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 7421 of this title (relating to consultation) or the consultation process required under such section 7421 shall not be required to be

promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after June 22, 1974, on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void on June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of

any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subpargaraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces,

the Governor of the State may, after notice and opportunity for public hearing, temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under subsection (a)(2)(I) of this section is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures (including the written evidence required by part D of this subchapter), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements the requirements of this section.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) of this section for not more than two years for an air quality control

region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and oppor-

tunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g)(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to

prevent substantial increases in unemployment which would result from such closing, and

which the Adminisrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 7419 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h)(1) Not later than one year after August 7, 1977, and annually thereafter, the Administrator shall assemble and

publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

Appendix 8

42 U.S.C. § 7413

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (hereafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 119(g) (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith effort to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments

of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D of this subchapter, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.

(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirement; or

(3) violates section 7411(e) of this title, section 7412(c) of this title, section 119(g) (as in effect before August 7, 1977), subsection (d)(5) of this section (relating to coal conversion), section 7624 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders), or any regulation under part B of this subchapter (relating to ozone); or

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties

against whom such action was brought in any case where the court finds that such action was unreasonable.

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section, or

(C) violates section 7411(e), section 7412(c) of this title; or

(D) violates any requirement of section 119(g) (as in effect before August 7, 1977), subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties), or any requirement of part B of this subchapter (relating to ozone).

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application,

record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

(d)(1) A State (or, after thirty days notice to the State, the Administrator) may issue to any stationary source which is unable to comply with any requirement of an applicable implementation plan an order which specifies a date for final compliance with such requirement later than the date for attainment of any national ambient air quality standard specified in such plan if—

(A) such order is issued after notice to the public (and, as appropriate, to the Administrator) containing the content of the proposed order and opportunity for public hearing;

(B) the order contains a schedule and timetable for compliance;

(C) the order requires compliance with applicable interim requirements as provided in paragraph (5)(B) (relating to sources converting to coal), and paragraph (6) and (7) (relating to all sources receiving such orders) and requires the emission monitoring and reporting by the source authorized to be required under sections 7410(a)(2)(F) and 7414(a)(1) of this title;

(D) the order provides for final compliance with the requirement of the applicable implementation plan as expeditiously as practicable, but (except as provided in paragraph (4) or (5)) in no event later than July 1, 1979, or three years after the date for final compliance with such requirement specified in such plan, whichever is later; and

(E) in the case of a major stationary source, the order notifies the source that, unless exempted under section 120(a)(2)(B) or (C), it will be required to pay a noncompliance penalty effective July 1, 1979, as provided under section 7420 of this title or by such later date as is set forth in the order in accordance with section 7420(b)(3) or (g) of this title in the event such source fails to achieve final compliance by July 1, 1979.

(2) In the case of any major stationary source, no such order issued by the State shall take effect until the Administrator determines that such order has been issued in accordance with the requirements of this chapter. The Administrator shall determine, not later than 90 days after receipt of notice of the issuance of an order under this subsection with respect to any major stationary source, whether or not any State order under this subsection is in accordance with the requirements of this chapter. In the case of any source other than a major stationary source, such order issued by the State shall cease to be effective upon a determination by the Administrator that it was not issued in accordance with the requirements of this chapter. If the Administrator so objects, he shall simultaneously proceed to issue an enforcement order in accordance with

subsection (a) of this section or an order under this subsection. Nothing in this section shall be construed as limiting the authority of a State or political subdivision to adopt and enforce a more stringent emission limitation or more expeditious schedule or timetable for compliance than that contained in an order by the Administrator.

(3) If any source not in compliance with any requirement of an applicable implementation plan gives written notification to the State (or the Administrator) that such source intends to comply by means of replacement of the facility, a complete change in production process, or a termination of operation, the State (or the Administrator) may issue an order under paragraph (1) of this subsection permitting the source to operate until July 1, 1979, without any interim schedule of compliance: *Provided*, That as a condition of the issuance of any such order, the owner or operator of such source shall post a bond or other surety in an amount equal to the cost of actual compliance by such facility and any economic value which may accrue to the owner or operator of such source by reason of the failure to comply. If a source for which the bond or other surety required by this paragraph has been posted fails to replace the facility, change the production process, or terminate the operations as specified in the order by the required date, the owner or operator shall immediately forfeit on the bond or other surety and the State (or the Administrator) shall have no discretion to modify the order under this paragraph or to compromise the bond or other surety.

(4) An order under paragraph (1) of this subsection may be issued to an existing stationary source if—

(A) the source will expeditiously use new means of emission limitation which the Administrator determines is likely to be adequately demonstrated (within the meaning of section 7411(a)(1)) of this title upon expiration of the order,

(B) such new means of emission limitation is not likely to be used by such source unless an order is granted under this subsection.

(C) such new means of emission limitation is determined by the Administrator to have a substantial likelihood of—

(i) achieving greater continuous emission reduction than the means of emission limitation which, but for such order, would be required; or

(ii) achieving an equivalent continuous reduction at lower cost in terms of energy, economic, or nonair quality environmental impact; and

(D) compliance by the source with the requirement of the applicable implementation plan would be impracticable prior to, or during, the installation of such new means.

Such an order shall provide for final compliance with the requirement in the applicable implementation plan as expeditiously as practicable, but in no event later than five years after the date on which the source would otherwise be required to be in full compliance with the requirement.

(5)(A) In the case of a major stationary source which is burning petroleum products or natural gas, or both and which—

(i) is prohibited from doing so under an order pursuant to the provisions of section 792(a) of Title 15 or any amendment thereto, or any subsequent enactment which supersedes such provisions, or

(ii) within one year after August 7, 1977, gives notice of intent to convert to coal as its primary energy source because of actual or anticipated curtailment of natural gas supplies under any curtailment plan or schedule approved by the Federal Power Commission (or, in the case of intrastate natural gas supplies, approved by the appropriate State regulatory commission),

and which thereby would no longer be in compliance with any requirement under an applicable implementation plan, an order may be issued by the Administrator under paragraph (1) of this subsection for such source which specifies a date for final compliance with such requirement as expeditiously as practicable, but not later than December 31, 1980. The Administrator may issue an additional order under paragraph (1) of this subsection for such source providing an additional period for such source to come into compliance with the requirement in the applicable implementation plan, which shall be as expeditiously as practicable, but in no event later than five years after the date required for compliance under the preceding sentence.

(B) In issuing an order pursuant to subparagraph (A), the Administrator shall prescribe (and may from time to time modify) emission limitations, requirements respecting pollution characteristics of coal, or other enforceable measures for control of emissions for each source to which

such an order applies. Such limitations, requirements, and measures shall be those which the Administrator determines must be complied with by the source in order to assure (throughout the period before the date for final compliance established in the order) that the burning of coal by such source will not result in emissions which cause or contribute to concentrations of any air pollutant in excess of any national primary ambient air quality standard for such pollutant.

(C) The Administrator may, by regulation, establish priorities under which manufacturers of continuous emission reduction systems necessary to carry out this paragraph shall provide such systems to users thereof, if he finds, after consultation with the States, that priorities must be imposed in order to assure that such systems are first provided to sources subject to orders under this paragraph in air quality control regions in which national primary ambient air quality standards have not been achieved. No regulation under this subparagraph may impair the obligation of any contract entered into before August 7, 1977.

(D) No order issued to a source under this paragraph with respect to an air pollutant shall be effective if the national primary ambient air quality standard with respect to such pollutant is being exceeded at any time in the air quality control region in which such source is located. The preceding sentence shall not apply to a source if, upon submission by any person of evidence satisfactory to the Administrator, the Administrator determines (after notice and public hearing)—

(i) that emissions of such air pollutant from such source will affect only infrequently the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time;

(ii) that emissions of such air pollutant from such source will have only insignificant effect on the air quality concentrations of such pollutant in each portion of the region where such standard is being exceeded at any time; and

(iii) with reasonable statistical assurance that emissions of such air pollutant from such source will not cause or contribute to air quality concentrations of such pollutant in excess of the national primary ambient air quality standard for such pollutant.

(6) An order issued to a source under this subsection shall set forth compliance schedules containing increments of progress which require compliance with the requirement postponed as expeditiously as practicable.

(7) A source to which an order is issued under paragraph (1), (3), (4), or (5) of this subsection shall use the best practicable system or systems of emission reduction (as determined by the Administrator taking into account the requirement with which the source must ultimately comply) for the period during which such order is in effect and shall comply with such interim requirements as the Administrator determines are reasonable and practicable. Such interim requirements shall include—

(A) such measures as the Administrator determines are necessary to avoid an imminent and substantial endangerment to health of persons, and

(B) a requirement that the source comply with the requirements of the applicable implementation plan during any such period insofar as such source is able to do so (as determined by the Administrator).

(8) Any order under paragraph (1) of this subsection shall be terminated if the Administrator determines on the record, after notice and hearing, that the inability of the source to comply no longer exists. If the owner or operator of the source to which the order is issued demonstrates that prompt termination of such order would result in undue hardship, the termination shall become effective at the earliest practicable date on which such undue hardship would not result, but in no event later than the date required under this subsection.

(9) If the Administrator determines that a source to which an order is issued under this subsection is in violation of any requirement of this subsection, he shall—

(A) enforce such requirement under subsections (a), (b), or (c) of this section,

(B) (after notice and opportunity for public hearing) revoke such order and enforce compliance with the requirement with respect to which such order was granted,

(C) give notice of noncompliance and commence action under section 7420 of this title, or

(D) take any appropriate combination of such actions.

(10) During the period of the order in effect under this subsection and where the owner or operator is in compliance with the terms of such order, no Federal enforcement action pursuant to this section and no action under section 7604 of this title shall be pursued against such owner or operator based upon noncompliance during the period the order is in effect with the requirement for the source covered by such order.

(11) For the purposes of section 7410, 7604, and 7607 of this title, any order issued by the State and in effect pursuant to this subsection shall become part of the applicable implementation plan.

(12) Any enforcement order issued under subsection (a) of this section or any consent decree in an enforcement action which is in effect on August 7, 1977, shall remain in effect to the extent that such order or consent decree is (A) not inconsistent with the requirements of this subsection and section 7419 of this title or (B) the administrative orders on consent issued by the Administrator on November 5, 1975 and February 26, 1976 and requiring compliance with sulfur dioxide emission limitations or standards at least as stringent as those promulgated under section 7411 of this title. Any such enforcement order issued under subsection (a) of this section or consent decree which provides for an extension beyond July 1, 1979, except such administrative orders on consent, is void unless modified under this subsection within one year after August 7, 1977, to comply with the requirements of this subsection.

Appendix 9

42 U.S.C. § 7502

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to to[1] the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a) of this section;

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 7504 of this title (relating to planning procedures) and include (A) an identification and analysis of the air quality, health, welfare, economic, energy, and social effects of the plan provisions required by this subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a) of this section—

(A) establish a program which requires, prior to issuance of any permit for construction or modifi-

cation of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment of the applicable national ambient air quality standard not later than December 31, 1987.

(c) In the case of a State plan revision required under the Clean Air Act Amendments of 1977 to be submitted before July 1, 1982, by reason of a demonstration under subsection (a)(2) of this section, effective on such date such plan shall contain enforceable measures to assure attainment of the applicable standard not later than December 31, 1987.

Appendix 10

42 U.S.C. § 7503

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if—

(1) the permitting agency determines that—

(A) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities and from the proposed source will be sufficiently less than total emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(b) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under com-

mon control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1)(A) shall be legally binding before such permit may be issued.

Appendix 11

42 U.S.C. § 7506

(a) The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained,

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).

(b) In any area in which the State or, as the case may be, the general purpose local government or governments or any regional agency designated by such general purpose local governments for such purpose, is not implementing any requirement of an approved or promulgated plan under section 7410 of this title, including any requirement for a revised implementation plan under this part, the Administrator shall not make any grants under this chapter.

(c) No department, agency, or instrumentality of the Federal Government shall (1) engage in, (2) support in any way or provide financial assistance for, (3) license, or permit, or (4) approve, any activity which does not conform to a plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23 shall give its approval to any project, program, or plan which does not conform to a plan approved or promulgated under section 7410 of this title. The assurance of conformity to such a plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality.

(d) Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air-quality related transportation consquences shall give priority in the exercise of such authority, consistent with statutory requirements for allocation among States or other jurisdictions, to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard. This paragraph extends to, but is not limited to, authority exercised under the Urban Mass Transportation Act, Title 23, and the Housing and Urban Development Act.

Appendix 12

42 U.S.C. § 7602

When used in this chapter—

(a) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(b) The term "air pollution control agency" means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this chapter;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term "interstate air pollution control agency" means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa and includes the Commonwealth of the Northern Mariana Islands.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

(f) The term "municipality" means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law.

(g) The term "air pollutant" means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

(i) The term "Federal land manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(j) Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(*l*) The term "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

(m) The term "means of emission limitation" means a system of continuous emission reduction (including the use of specific technology or fuels with specified pollution characteristics).

(n) The term "primary standard attainment date" means the date specified in the applicable implementation plan for the attainment of a national primary ambient air quality standard for any air pollutant.

(*o*) The term "delayed compliance order" means an order issued by the State or by the Administrator to an

existing stationary source, postponing the date required under an applicable implementation plan for compliance by such source with any requirement of such plan.

(p) The term "schedule and timetable of compliance" means a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard.

Appendix 13

42 U.S.C. § 7604

(a) Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(c)(1)(B) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment), any condition or requirement of section 7413(d) of this title (relating to certain enforcement orders), section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visability protection), any condition or requirement under part B of subchapter I of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise).

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

Appendix 14

42 U.S.C. § 7607

(a)(1)[1] In connection with any determination under section 7410(f) of this title or section 7521(b)(5) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon

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[1]Subsec. (a) enacted without paragraph (2).

application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title) any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Admin-

istrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in

rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d)(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,

(D) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(E) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(F) promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders),

(G) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under

section 7419 of this title (but not including the granting or denying of any such order),

(H) promulgation or revision of regulations under subtitle B of subchapter I of this chapter (relating to stratosphere and ozone protection),

(I) promulgation or revision of regulations under subtitle C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(J) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521 (a)(3) of this title,

(K) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(L) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(M) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement), and

(N) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection

applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommenda-

tions, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking

shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later that the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the

rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7) (B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

Appendix 15

42 U.S.C. § 7616

(a) No grant which the Administrator is authorized to make to any applicant for construction of sewage treatment works in any area in any State may be withheld, conditioned, or restricted by the Administrator on the basis of any requirement of this chapter except as provided in subsection (b) of this section.

(b) The Administrator may withhold, condition, or restrict the making of any grant for construction referred to in subsection (a) of this section only if he determines that—

(1) such treatment works will not comply with applicable standards under section 7411 or 7412 of this title,

(2) the State does not have in effect, or is not carrying out, a State implementation plan approved by the Administrator which expressly quantifies and provides for the increase in emissions of each air pollutant (from stationary and mobile sources in any area to which either part C or part D of subchapter I of this chapter applies for such pollutant) which increase may reasonably be anticipated to result directly or indirectly from the new sewage treatment capacity which would be created by such construction.

(3) the construction of such treatment works would create new sewage treatment capacity which—

(A) may reasonably be anticipated to cause or contribute to, directly or indirectly, an increase in

emissions of any air pollutant in excess of the increase provided for under the provisions referred to in paragraph (2) for any such area, or

(B) would otherwise not be in conformity with the applicable implementation plan, or

(4) such increase in emissions would interfere with, or be inconsistent with, the applicable implementation plan for any other State.

In the case of construction of a treatment works which would result, directly or indirectly, in an increase in emissions of any air pollutant from stationary and mobile sources in an area to which part D of subchapter I of this chapter applies, the quantification of emissions referred to in paragraph (2) shall include the emissions of any such pollutant resulting directly or indirectly from areawide and nonmajor stationary source growth (mobile and stationary) for each such area.

(c) Nothing in this section shall be construed to amend or alter any provision of the National Environmental Policy Act or to affect any determination as to whether or not the requirements of such Act have been met in the case of the construction of any sewage treatment works.

Appendix 16

Public Law No. 95-95, § 129(c), as amended by
Public Law No. 95-190, § 14(b)(4)

Notwithstanding the requirements of section 406(d)(2) (relating to date required for submission of certain implementation plan revisions), for purposes of section 110(a)(2) of the Clean Air Act [42 U.S.C. § 7410(a)(2)] each State in which there is any nonattainment area (as defined in part D of title I of the Clean Air Act) shall adopt and submit an implementation plan revision which meets the requirements of section 110(a)(2)(I) [42 U.S.C. § 7410(a)(2)(I)] and part D of title I of the Clean Air Act not later than January 1, 1979. In the case of any State for which a plan revision adopted and submitted before such date has made the demonstration required under section 172(a)(2) of the Clean Air Act [42 U.S.C. § 7502(a)(2)] (respecting impossibility of attainment before 1983), such State shall adopt and submit to the Administrator a plan revision before July 1, 1982, which meets the requirements of section 172(b) and (c) of such Act [42 U.S.C. § 7502(b) and (c)].

Appendix 17

44 Fed. Reg
38471-38473

40 CFR Part 52
(FRL 1262-3)

Approval and Promulgation of Implementation Plans; Statutory Restriction on New Sources Under Certain Circumstances for Nonattainment Areas

Agency: Environmental Protection Agency.

Action: Interpretive rule.

Summary: In the 1977 amendments to the Clean Air Act, Congress established a statutory restriction on construction of certain major sources of air pollution after June 30, 1979, if state implementation plans are inadequate or are not adequately carried out for nonattainment areas. This interpretive rule codifies the statutory restriction in the Code of Federal Regulations and the state implementation plans. In the proposed rules section of this issue of the Federal Register, EPA is proposing additional language to clarify how the statutory restrictions will apply.

EPA is now in the process of reviewing and approving revised plans. Although few plans have been approved, EPA expects no widespread impact from the restriction on new sources. This is because permit applications filed on or before June 30, 1979, are not subject to the restriction. For applications filed after that date, which are subject to the restriction, the administrative process will take several months after June 30 before a permit can be approved and issued regardless of the restriction. Most plans can be

approved and the restriction ended before sources subject to the restriction are ready to begin construction. For plans that contain minor deficiencies, EPA proposes to approve them and cause the restriction to end, on the condition the states submit corrections on specified schedules. Therefore, EPA does not expect major disruptions of industrial activities where states are making reasonable and expeditious efforts toward submitting an approvable state implementation plan revision.

Dates: The provisions stated in this notice are applicable to construction permits applied for after June 30, 1979.

For Further Information Contact:

The appropriate EPA regional office listed at 44 FR 20372 (April 4, 1979), or the following headquarters office: G. T. Helms, Chief, Control Programs Operations Branch, Control Programs Development Division, Office of Air Quality Planning and Standards (MD-15), Research Triangle Park, North Carolina 27711 (919) 541-5365 or 541-5226.

Supplementary Information:

I. Background

In the 1970 amendments to the Clean Air Act,[1] Congress directed EPA to establish primary national ambient air quality standards (NAAQS) to protect the public health, and secondary NAAQS to protect the public welfare, and directed the states to develop and adopt state implementation plans (SIPs) to attain and maintain the standards.

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[1]The Clean Air Act, as amended, is codified at 42 U.S.C. 7401 *et seq.*

EPA was given responsibilty for reviewing SIPs and either approving or disapproving them. In 1971 EPA promulgated NAAQS for several pollutants.[2] SIPs were developed and placed into effect.

In 1971, EPA promulgated regulations requiring each plan to provide for preconstruction review of proposed new sources and modifications of existing sources, to prevent "interfer[ence] with the attainment or maintenance of a national standard."[3] Plan provisions were approved or promulgated for each state plan to satisfy this requirement.

The Act required attainment of the NAAQS in most regions by 1975, with some extensions until 1977. By 1978 it became apparent that, despite significant progress, SIPs were inadequate to achieve the NAAQS in many areas of the country. Questions arose as to whether, and under what circumstances, new stationary sources might legally be permitted to construct in areas where the NAAQS were not being met. In response to these questions, EPA published its Emission Offset Interpretative Ruling.[4] The Ruling interpreted the Act, EPA regulations, and each state plan, so as to allow new construction in areas where NAAQS were violated if stringent conditions were met that would assure further progress toward attainment of the standards.

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[2]40 CFR Part 50.

[3]40 CFR 51.15(b).

[4]Originally promulgated on December 21, 1976, the Ruling was recently revised. 40 CFR Part 51, Appendix S, as revised 44 FR 3274 (January 16, 1979).

In August 1977 Congress amended the Act to establish a statutory approach permitting growth in polluted areas, while still assuring attainment of the NAAQS by specific deadlines.[5] Congress instructed each state to list those areas where NAAQS were still not attained as of August 7, 1977 (nonattainment areas), and required EPA to promulgate the list with any necessary changes.[6] Each state then had to submit a SIP revision by January 1, 1979, providing for attainment of the NAAQS as expeditiously as practicable, and for primary standards no later than the end of 1982 (or the end of 1987 for areas with particularly difficult ozone or carbon monoxide problems).

Congress also provided that EPA's Offset Ruling would govern new source construction before July 1, 1979. From that date forward, however, proposed major sources are to be reviewed under the provision of a revised SIP that meets the requirements of Part D, Title I, of the Act. If, as of July 1, 1979, a state does not have a revised plan in effect that satisfied the requirements of Part D. Congress established that the Offset Ruling would cease to apply and there would be a statutory restriction on major new construction until the plan is revised to satisfy the requirements of Part D. Congress also established that, if the revised plan is not carried out after July 1 in accordance with Part D, construction permits are not to be issued. This statutory restriction on new sources is stated in sec-

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[5]Sections 107(d) and 172 of the Act (42 U.S.C. 7407(d) and 7502); sections 129(a) and (c) of the 1977 Amendments, Pub. L. No. 95-95 (notes under 42 U.S.C. 7502).

[6]A list of nonattainment areas was promulgated on March 3, 1978, with some subsequent modification. 46 CFR 81.300 *et seq.*

tions 110(a)(2)(I) and 173(4) of the Act and section 129(a) of the 1977 amendment to the Act (40 U.S.C. 7410 (a)(2)(I), 7503(4), and note under 7502).

The underlying purpose of the restriction on new sources is not to punish a state for failure to control pollution, but rather to prevent the pollution problem from getting worse.[7] The restriction postpones construction that would worsen a violation of a national standard until after an acceptable state plan is in effect that assures timely attainment of the standard.

II. Discussion

1. *Nondiscretionary Statutory Restriction on New Sources.* The statutory language and legislative history indicate that the statutory restriction is automatic and mandatory under the Act and existing state implementation plans, and is not a new prohibition that can be imposed or withheld at EPA's discretion. In the absence of the Offset Ruling, which terminated for most areas as of July 1, the 1970 Act and EPA regulations implementing it (40 CFR 51.18) require each plan to prohibit construction that would cause or contribute to a violation after the date specified in the plan for attaining the standard.[8] If the plan is revised and carried out in accordance with the require-

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[7]This purpose is clear from the legislative history discussed below.

[8]*See* Report to accompany H.R. 10498, H.R. Rep. No. 94-1175, 94th Cong., 2d Sess. 178-179 (May 15, 1976); Report to accompany S. 3219, S. Rep. No. 94-717, 94th Cong. 2d Sess. 42 (March 29, 1976); Report to accompany H.R. 6151, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 208, 211 (May 12, 1977); Report to accompany S. 252, S. Rep. No. 95-127, 95th Cong., 1st Sess. 55 (May 10, 1977).

ments of Part D, the 1977 amendments to the Act provide that the prohibition required by 40 CFR 51.18 be lifted.

Each plan now has a provision approved or promulgated as meeting the requirements of 40 CFR 51.18. Therefore, Act sections 110(a)(2)(I) and 173(4) and this interpretive rule define the scope of the new source restriction already required by existing state plans.[9] To the extent any particular state plan is alleged to allow construction after July 1 and the termination of the Offset Ruling, to that extent the plan is disapproved and sections 110(a)(2)(I) and 173(4) and this interpretive rule impose the statutory restriction upon the state plan as a matter of law.

The basic terms of the statutory new source restriction are set forth in paragraphs (a) and (b) of section 52.24 added to 40 CFR by this notice. The Clear Air Act provides unambiguously that the statutory restriction is to apply after June 30, 1979, if a state plan does not satisfy the requirements of Part D or is not being carried out in accordance with the requirements of Part D. While issues of fact, policy, and interpretation may be relevant in determining whether the statutory restriction applies to any particular area or any particular source.[10] The general

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[9]Some states are adopting provisions that track the language of sections 110(a)(2)(I) and 173(4), similar to this interpretive rule. Where such provisions are adequate, this interpretive rule does not affect the plan provisions.

[10]Where the statutory language is unclear and EPA has not issued a final clarifying rule, elaboration can be achieved in the course of case-by-case decisionmaking for individual areas and proposed sources. Such case-by-case decisionmaking may include:

provisions stated in this notice were established nationwide by Congress as a matter of law. The regulatory language tracks the language from the statute, and does not alter the legal requirments established there. Therefore, EPA finds that this is an interpretive rule for which notice and public procedure are unnecessary.[11]

Paragraphs (c) and (d) of 40 CFR 52.24 involve grandfathering of certain permits and application of the new source restriction only to the pollutant for which the plan is inadequate. These sections, as discussed more fully below, derive from unambiguous statutory language and legislative history and from regulatory actions already taken by EPA. These paragraphs therefore are also interpretive rules that do not alter existing legal requirements and for which notice and public procedure are unnecessary.

In the Proposed Rules section of today's issue of the Federal Register, EPA is proposing to add paragraph (e), clarifying the manner in which the statutory restriction on new sources will apply. The clarifying provisions would

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(1) EPA decisions of whether a revised plan satisfies the requirements of Part D; (2) findings by EPA or a state in reviewing an application to construct and operate a new source or modification; (3) EPA rulings requested by the owner or operator of a proposed source on whether the source would be subject to the statutory restriction, and (4) findings and decisions by EPA or a U.S. District Court in enforcement proceedings.

[11] *See* 5 U.S.C. 553(b)(A) and (B) Administrative Procedure Act); the last sentence of section 307(d)(1) of the Clean Air Act (42 U.S.C. 7607(d)(1)); Report to accompany H.R. 6161, H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 320 (May 12, 1977). Authority to promulgate the rule is provided by both sections 110(c)(1) and 301(a)(1) of the Act (42 U.S.C. 7401(c)(1) and 7601(a)(1)).

involve the treatment of sources outside of the nonattainment area, and the significance of a source's impact on a violation within the nonattainment area. EPA believes there is sufficient ambiguity on these points to require public comment. Therefore, EPA will not issue a final ruling on these last issues until after comment is received and evaluated. However, if a source is ready to commence construction and EPA has not taken final action on the proposed clarifying language, a determination of whether the statutory moratorium applies to the source must be made on a case-by-case basis, with reference to the language of the statute, 40 CFR 52.24(a)-(d), and any other relevant regulations.

2. *Grandfathered Permits.* Section 110(a)(2)(I) of the Act provides that construction should be forbidden after June 30, 1979, "unless as of the time of application for a permit for such construction or modification, such plan meets the requirements of Part D * * *." Legislative history indicates that a SIP should not be viewed as out of compliance with Part D until after the deadline for having a revised SIP that satisfies the requirements of Part D.[12] As provided in the recently revised Offset Ruling, permits applied for before the deadline may be issued and construction may commence if the requirements of the Offset Ruling are satisfied.[13] The deadline is July 1, 1979 for areas designated as nonattainment on March 3, 1978 (43 FR

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[12]Report to accompany S. 252, S. Rep. No. 95-127, 95th Cong., 1st Sess. 54, 169 (May 10. 1977).

[13]40 CFR Part 51, Appendix S, section I, as revised 44 FR 3275 col. 2, 3282 col. 2 (January 16, 1979).

9862), and for other areas it is nine months after the designation.[14]

Section 173(4) of the Act establishes that a permit may not be issued if the plan is not being carried out in accordance with the requirements of Part D. This section applies only to permits applied for after termination of the Offset Ruling on the July 1, 1979 (or other appropriate) deadline. However, since the key requirement under this section is that the plan is being carried out when the permit is issued, it is irrelevant whether the plan is being carried out when the permit application is filed.

The interpretations on grandfathered permits are found in paragraph (c) of 40 CFR 52.24, as added by this notice.

3. *Relevant Pollutant.* Paragraph (d) of 40 CFR 52.24 provides that the restriction on new sources applies only to major sources of the pollutant for which the area was designated as nonattainment of Part D. This interpretation is compelled by the legislative history and structure of the statute.[15]

4. *New or Modified Major Stationary Sources.* According to the statutory language, the statutory restriction on new sources applies to construction or modification of

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[14]No additional time is available, however, when an area boundary is adjusted but the same air quality problem and sources contributing to the problem are addressed. *See* 44 FR 20379 col. 3 (April 4, 1979).

[15]Each nonattainment area and each plan, as defined in the Act, applies to only a single national ambient air quality standard. Since sections 110(a)(2)(I) and 173(4) refer to each nonattainment area and plan in the singular, these provisions must apply to the single standard relevant to the particular area and plan. *See also* the statutory purpose and legislative history discussed above.

"major stationary sources," with "major stationary source" being defined as any stationary facility or source that "directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * *."[16] The United States Court of Appeals for the District of Columbia Circuit very recently issued a decision interpreting similar statutory terms.[17] The Agency will consider both the statutory language and this decision in determining the sources and modifications that are subject to the statutory restriction on new sources. EPA will shortly issue a statement explaining the effect of this decision on the classes of sources subject to various requirements under the Act, including the restriction on new sources.

III. Authority

This ruling is issued under Section 129(a) of the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 745,

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[16]Sections 110(a)(2)(I), 172(b)(6), 173(4), and 302(j) of the Act (42 U.S.C. 7410(A)(2)(I), 7502(b)(6), 7503(4), and 7602(j)).

[17]*Alabama Power Co. v. Costle*, Nos. 78-1006 *et al.* (D.C. Cir., June 16, 1979). The Court decided, among other things, that for purposes of the Prevention of Significant Deterioration provisions of the Act (sections 161 and following):

(A) a source is "major" if it "either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount."

(B) a source's "potential to emit" must be "calculated on the assumption that air pollution control equipment incorporated into the design of the facility will function to control emissions in the manner reasonably anticipated when the calculation is made;" and

(C) there is a "modification" of a source if both (1) there is "a physical change in or a change in the method of operation of a stationary source," and (2) there is "a net increase in the potential to emit any air pollutant." (Slip op. at 9 and 21.)

August 7, 1977 (note under 42 U.S.C. 7502) and Sections 110, 172 and 301 of the Clean Air Act, as amended (42 U.S.C. 7410, 7502, and 7601).

The Administrator has determined that this rule is nationally applicable and is based on determinations of nationwide scope and effect. EPA intends that, for purposes of judicial review, the interpretations made by this notice be treated as severable.

Under Executive Order 12044 EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA labels these other regulations "specialized". I have reviewed this regulation and determined that it is a specialized regulation not subject to the procedural requirements of Executive Order 12044.

Dated: June 27, 1979.

Barbara Blum,

Acting Administrator.

40 CFR Part 52, Subpart A, is amended by adding the following section:

§ 52.24 Statutory restriction on new sources.

(a) After June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as designated in 40 CFR Part 81, Subpart C) ("nonattainment area") to which any state implementation plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such

area, unless, as of the time of application for a permit for such construction, such plan meets the requirements of part D, title I, of the Clean Air Act, as amended (42 USC 7501 *et seq.*) ("Part D").

(b) For any nonattainment area for which the SIP satisfies the requirements of Part D, permits to construct and operate new or modified major stationary sources may be issued only if the applicable SIP is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of Part D.

(c) The Emission Offset Interpretative Ruling, 40 CFR Part 51, Appendix S ("Offset Ruling"), rather than paragraphs (a) and (b), governs permits to construct and operate applied for before the deadline for having a revised SIP in effect that satisfies Part D. This deadline is July 1, 1979, for areas designated as nonattainment on March 3, 1978 (42 F.R. 8962). The revised SIP, rather than paragraph (a), governs permits applied for during a period when the revised SIP is in compliance with Part D.

(d) The restrictions in paragraphs (a) and (b) apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant for which the nonattainment area was designated as nonattainment, and for which the SIP does not meet the requirements of Part D or is not being carried out in accordance with the requirements of Part D.

(FR Doc. 79—20431 Filed 6-29-79; 8:45 a.m.)

BILLING CODE 6560-01-M

Appendix 18

44 Fed. Reg. 57109-57117

40 CFR Part 52

[FRL 1332-8]

Approval and Promulgation of Implementation Plans; San Diego Nonattainment Area Plan and Revised Regulations

Agency: Environmental Protection Agency.

Action: Notice of Proposed Rulemaking.

Summary: Revisions to the San Diego Air Basin portion of the California State Implementation Plan (SIP) have been submitted to the Environmental Protection Agency (EPA) by the Governor's designee. The intended effect of the revisions is to update the rules and regulations, and to meet the requirements of Part D of the Clean Air Act, as amended in 1977, "Plan Requirements for Nonattainment Areas." However, based upon EPA's evaluation of the revisions, this notice proposes to disapprove the carbon monoxide and ozone portions of the San Diego Air Basin nonattainment area plan with respect to the Part D requirements because the plan does not contain the necessary legal authority from the California State Legislature to implement a vehicle emission control inspection and maintenance program. Any plan that cannot demonstrate attainment of the carbon monoxide or ozone standard by 1982 and requests an extension to 1987, such as San Diego's, must contain the necessary legal authority to implement an inspection and maintainance program.

This notice provides a description of the proposed SIP revisions, summarizes the applicable nonattainment area requirements, compares the revisions to these requirements, identifies major issues in the proposed revisions, and proposes a schedule for correction of plan deficiencies with respect to the nonattainment area requirements.

On April 4, 1979, (44 FR 20372) EPA published a General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas. In addition, EPA published a Supplement to the General Preamble on July 2, 1979 (44 FR 38583). The General Preamble supplements this proposal by identifying the major considerations that will guide EPA's evaluation of the submittal. EPA's evaluation of the transportation portion of the SIP is also guided by the EPA-Department of Transportation (DOT) Transportation Planning Guidelines and EPA's Office of Transportation and Land Use Policy SIP-Transportation Checklist. The EPA-DOT Guidelines describe the acceptable process elements that satisfy Clean Air Act requirements for the transportation portion of an approvable SIP.

The EPA invites public comments on these revisions, the identified issues, the suggested corrections and associated proposed deadlines, and whether the revisions should be approved, conditionally approved, or disapproved, especially with respect to the requirements of Part D of the Clean Air Act.

DATES: Comments may be submitted on or before November 5, 1979.

ADDRESSES: Comments may be sent to:

Regional Administrator, Attn: Air & Hazardous Materials Division, Air Technical Branch, Regulatory Section (A-4).

Environmental Protection Agency, Region IX, 215 Fremont Street, San Francisco, CA 94105.

Copies of the Proposed Revision/Nonattainment Area Plan and EPA's associated Evaluation Report are contained in document file NAP-CA-19 and are available for public inspection during normal business hours at the EPA Region IX Office at the above address and at the following locations:

San Diego Air Pollution Control District, 9150 Chesapeake Drive, San Diego, CA 92123.

Comprehensive Planning Organization, 1200 Third Avenue, San Diego, CA 92101.

California Air Resources Board, 1102 Q Street, P.O. Box 2815, Sacramento, CA 95812.

Public Information Reference Unit, Room 2922 (EPA Library), 401 "M" Street S.W., Washington, D.C. 20460.

For further information contact:

Douglas Grano, Chief, Regulatory Section, Air Technical Branch, Air & Hazardous Materials Division, Environmental Protection Agency, Region IX, (415) 556-2938.

Supplementary information:

Background

New provisions of the Clean Air Act, enacted in August 1977, Public Law 95-95, requires states to revise their

SIP's for all areas that do not attain the National Ambient Air Quality Standards (NAAQS). The amendments required each state to submit to the Administrator a list of the NAAQS attainment status for all areas within the state. The Administrator promulgated these lists, with certain modifications, on March 3, 1978 (43 FR 8962). State and local governments were required to develop, adopt, and submit to EPA revisions to their SIP, for nonattainment areas, by January 1, 1979 which meet the requirements of Part D of the Clean Air Act and which provide for attainment of the NAAQS as expeditiously as practicable.

The west portion of the San Diego Air Basin is designated nonattainment for particulate matter, nitrogen dioxide and carbon monoxide. The entire San Diego Air Basin is designated nonattainment for photochemical oxidants (ozone).

Description of Proposed SIP Revisions

On July 5, 1979 the Executive Officer of the California Air Resources Board (ARB), the Governor's official designee, submitted the San Diego Air Basin Control Strategy as a SIP revision. Preparation of the proposed SIP revision was coordinated by the Comprehensive Planning Organization, the San Diego County Air Pollution Control District, and the ARB. This nonattainment area plan for San Diego consists of the following major components:

A summary of those pollutants that exceed the NAAQS, specifying the violations by pollutant;

A list of the Federal nonattainment area plan requirements and the plan elements addressing those requirements;

A discussion of the planning process including how the plan was prepared, the agencies involved in the process, public participation, and intergovernmental consultation;

A discussion of air quality trends;

An analysis of the candidate air quality control measures that examines expected emission reductions, costs, resource impacts, social impacts, and inforcement aspects;

A discussion of the specific strategies for ozone, carbon monoxide, particulate matter, and nitrogen dioxide which includes schedules for reasonable further progress, adopted stationary source control measures, and commitments to adopt additional stationary and mobile source control measures; and

A discussion of the commitment to adopt new source review provisions.

The plan indicates that attainment of the ozone and carbon monoxide standards by 1982 is not possible despite the implementation of all reasonably available control measures including:

California's motor vehicle standards on new vehicles:

An automobile inspection and maintenance program, assuming the appropriate legal authority will be adopted by the California Legislature;

More stringent stationary source control measures;

Transportation measures to reduce the use of automobiles, including improved public transit, carpooling programs, staggered work hours, and traffic control; and

A new source review program;

The State requests an extension of the ozone and carbon monoxide attainment dates until no later than December 31, 1987.

The plan indicates that attainment of the nitrogen dioxide and total suspended particulate standards by 1982 will be very difficult to achieve despite the implementation of all reasonably available control measures. Therefore, the State has requested additional time to study and develop control measures and submit a revised control strategy.

In addition to the July 5, 1979 plan submittal, this notice considers amendments to the San Diego County Air Pollution Control District rules and regulations submitted to EPA by the Governor's designee on May 7 and 23, 1979 as SIP revisions. Vapor recovery rules which had been submitted by the Governor's designee on October 13, 1977 and July 13, 1978 as SIP revisions are also addressed in this notice. EPA had deferred action on these rules until a complete set of vapor recovery rules could be considered together. Finally, several minor revisions to Rule 11, which impacts certain vapor recovery requirements, are addressed in this notice.

The rules being considered in this notice are listed below and include changes in the description of the San Diego Air Basin, exemptions for certain equipment categories from the District permit system, and new vapor recovery rules for existing sources.

San Diego County APCD Rules and Regulations
July 22, 1975 and February 10, 1977:

Rule 11, Exemptions

October 13, 1977:

Rule 11, Exemptions

Rule 61.0, Definitions [except Sections (1) and (5)]

Rule 61.1, Receiving and Storing Volatile Organic Compounds at Bulk Plants and Bulk Terminals

July 13, 1978:

Rule 61.2, Transfer of Volatile Organic Compounds into Mobile Transport Tanks

May 7, 1979:

Rule 11, Exemptions

May 23, 1979:

Rule 2(t), Definitions

Rule 11, Exemptions

Rule 61.0, Definitions [Sections (1) and (5)]

Rule 61.3, Transfer of Volatile Organic Compounds into Stationary Storage Tanks

Rule 61.4, Transfer of Volatile Organic Compounds into Vehicle Fuel Tanks

Rule 61.5, Visible Emission Standards for Vapor Control Systems

Rule 61.7, Spillage of Volatile Organic Compounds

Criteria for Approval

The San Diego Air Basin Control Strategy must be evaluated to determine whether it is consistent with Part D of the Clean Air Act. The following list summarizes the basis Part D requirements for nonattainment area plans:

1. An accurate inventory of existing emissions.

2. A provision for expeditious attainment of the standards.

3. A determination of the level of control needed to attain by 1982 and, in the case of an extension request, by 1987.

4. Adoption in legally enforceable form of all measures necessary to provide for attainment or, where adoption by 1979 is not possible, a schedule for development, adoption, submittal, and implementation of these measures.

5. Emission reduction estimates for each adopted control measure.

6. Provisions for reasonable further progress as defined in Section 171 of the Clean Air Act.

7. An identification of an emissions growth increment.

8. Provisions for annual reporting with respect to items (4) and (6) above.

9. A permit program for major new or modified sources consistent with Section 173 of the Clean Air Act.

10. An identification of and commitment to the resources necessary to carry out the plan.

11. Evidence of public, local government, and state involvement and consultation.

12. Evidence that the proposed SIP revisions were adopted by the state after reasonable notice and public hearing.

13. For carbon monoxide and photochemical oxidants (ozone) SIP revisions that provide for attainment of the primary standards later than 1982:

a. A permit program for major new or modified sources requiring an evaluation of alternative sites and consideration of environmental and social costs.

b. In addition, for urbanized areas:

(1) A specific schedule and legal authority for implementation of a vehicle emission control inspection and maintenance program.

(2) A provision for implementation of reasonably available control measures for mobile sources.

(3) A commitment to establish, expand, or improve public transportation measures.

14. In photochemical oxidants (ozone) nonattainment areas requiring an extension beyond 1982, the revision must provide for adoption of legally enforceable regulations to reflect the application of reasonably available control technology (RACT) to those stationary sources for which EPA has published a Control Techniques Guideline by January 1978, and a commitment to adopt RACT regulations for additional sources to be covered by guidelines. For rural areas, only large sources (more than 100 tons/year potential emissions) must be so regulated.

Issues

The paragraph numbers below correspond to the Part D nonattainment area plan requirements discussed in the preceding section. CRITERIA FOR APPROVAL. Where

a plan discrepancy is identified, recommendations for revision of the plan are specified. The citations in the comments which follow refer to Sections 108, 110, and Part D, Sections 171-178, of the Clean Air Act, as amended.

The most significant issue with respect to the San Diego Nonattainment Area Plan for ozone (O_3) and carbon monoxide (CO) is the lack of legal authority to implement a motor vehicle inspection and maintenance (I/M) program. While the adopted plan provides for an I/M program, the State Legislature, as of this date, has failed to authorize the implementation of such a program. Therefore, the plan for O_3 and CO is unapprovable with respect to Part D of the Clean Air Act (the Act).

The Act requires that nonattainment area plans for areas such as San Diego, which demonstrate that the national ambient air quality standards (NAAQS) for O_3 and/or CO cannot be attained by December 1982 despite the implementation of all reasonably available control measures, must establish a specific schedule for implementation of an I/M program. A schedule for implementation is not contained in the plan due to the lack of legal authority to implement the I/M program.

Second, the requirement that all reasonably available control measures be adopted in a legally enforceable manner and implemented as expeditiously as practicable has not been satisfied. I/M is a reasonably available control measure but due to the lack of legal authority, the I/M program set forth in the plan has not been adopted in a legally enforceable manner. Moreover, without legislative

authorization, the I/M program cannot be implemented as expeditiously as practicable.

Finally, the requirement for emission reduction estimates for each control measure is not satisfied. The plan takes credit for reductions in hydrocarbons (ozone precursors), carbon monoxide, and nitrogen oxides as a result of an I/M program. However, without an authorized enforceable program, these reductions will not be achieved and cannot be credited in the plan.

If the I/M deficiency is not remedied by action of the State Legislature to authorize the implementation of an I/M program, the O_3 and CO plans for the San Diego area (as well as for the San Francisco Bay Area, the Los Angeles-Ventura area, Sacramento area, Fresno area and possibly other areas) will be dissapproved by EPA with respect to Part D of the Act. This overall plan disapproval would result in the continuation of the prohibition on certain major new source construction in those areas as set forth in Section 110(a)(2)(I) of the Act and EPA's Interpretive Rule on the Statutory Restriction on New Sources (44 FR 38471, July 2, 1979). In conformance with those regulations, currently, certain major new or modified stationary sources are prohibited from being constructed in California nonattainment areas. The prohibition on construction will remain in effect in the San Diego nonattainment area (as well as other areas) with respect to the O_3 and CO plans at least until the Legislature authorizes the implementation of an I/M program and until EPA approves the nonattainment area plan pursuant to Part D of the Act.

At such time as the Legislature provides legal authority to implement an I/M program, and at such time as the State submits a State Implementation Plan (SIP) revision containing (1) certification of such legal authority, (2) a commitment to implement and enforce an I/M program, (3) a commitment to achieve 25% reductions in both hydrocarbon and carbon monoxide exhaust emissions from light duty vehicles by December 31, 1987, and (4) a schedule with milestones of progress toward implementation, the deficiencies noted above may be resolved. Upon the State's submittal of the necessary documentation and assurances EPA will consider (and provide for public comment on) the approval of the I/M program for the San Diego area.

A full discussion of the San Diego plan with respect to EPA's 14 criteria for approval follows. EPA has identified certain portions of the plan that (1) are approvable, (2) are conditionally approvable subject to assurance by the State that corrections will be made by a specified deadline, or (3) contain major deficiencies which must be remedied prior to EPA's final approval of the plan with respect to Part D of the Act. EPA's evaluation using these three standards will determine whether the plan as a whole is (1) approvable, (2) conditionally approvable, or (3) disapprovable.

Those portions of the plan which are approvable are consistent with Section 110 and/or Part D of the Act and are proposed to be incorporated into the SIP, regardless of EPA's determination on whether the plan is ultimately approvable with respect to Part D. In addition, certain

technical portions of the plan are noted as being approved even though they are expected to be refined in future plan updates, and the mandated 1982 SIP revision for O_3 and CO.

Those portions of the plan which are conditionally approvable contain minor deficiencies which can be accepted on the condition that the State provide an assurance that the deficiency will be corrected and submitted as a SIP revision by a specified deadline. Conditional approval of the plan might be sufficient to lift the prohibition on new source construction described above. Conditional approval would mean that the restriction on new sources would not apply unless the State failed to submit corrections by the specified date, or unless the corrections were ultimately determined to be inadequate.

Those portions of the plan that are deemed to be major deficiencies must be corrected and submitted as SIP revisions in order for EPA to either approve or conditionally approve the plan with respect to Part D of the Act.

1. Emission Inventory

The plan includes an emission inventory for hydrocarbons (HC), carbon monoxide (CO), total suspended particulates (TSP), and nitrogen oxides (NO_x) identifying emission source categories and their estimated 1974/1975 emissions. Stationary, mobile, and area source estimates which comprise the inventory are based on emission factors cited in EPA's "Compilation of Air Pollutant Emission Factors" (AP—42) or derived from source test data, sur-

veys, localized data, actual usage data, computer models, and transportation studies.

The emission inventories for the four pollutants are reasonably comprehensive, accurate, and current inventories of actual emissions from all sources as required by Section 172(b)(4). However, the inventories for CO, TSP, and NO_x include emissions from the entire County while only the western portion of the County is designated nonattainment for these pollutants. Future emission inventory updates in the annual reports for CO, TSP, and NO_x should specifically include only those emissions from the nonattainment area. The inventories can, therefore, be corrected by narrowing the scope to include only the nonattainment area or by providing justification that the difference between the two inventories (entire basin versus nonattainment area) is insignificant.

The TSP inventory lists fugitive dust as one major source category contributing 61% of the total particulate emissions. In order to effectively define particulate control strategies, the fugitive dust source category should be refined to identify and quantify subcategories. This identification of subcategories along with the associated emission reductions will facilitate the prediction of specific emissions growth estimates and the measurement of TSP control strategy effectiveness. This portion of the TSP plan could be approved conditioned upon the State's submittal of the subcategories and associated emissions by January 1, 1980.

2. Attainment Provision

Section 172(a) of the Act requires that the plan shall provide for the attainment of the NAAQS for O_3, CO, TSP and nitrogen dioxide (NO_2) as expeditiously as practicable but not later than December 31, 1982. Where the State demonstrates that the standards for O_3 and/or CO cannot be attained by December 31, 1982 despite the implementation of all reasonably available control measures, an extension may be granted and the State must demonstrate attainment by no later than December 31, 1987. The plan does not quantitatively demonstrate attainment for any of the four nonattainment pollutants by December 31, 1982, nor does it quantitatively demonstrate attainment for O_3 or CO by December 31, 1987. Rather the plan calls for further study and analysis to provide for a more accurate quantitative demonstration of attainment. The approach for each pollutant is discussed in detail below.

Additionally, the plan does not include an emission projection for the statutory attainment dates for HC, CO, TSP or NO_2. This deficiency precludes an accurate demonstration of attainment. Emission projections for 1982 for all four pollutants are needed as well as projections for 1987 for HC and CO. It appears that, to a large extent, this information is available to the State and need only be submitted to EPA as a SIP revision. This portion of the plan could be approved conditioned upon the State's submittal of such projections by January 1, 1980.

Ozone (O_3)

The plan addresses the revised national standard for O_3 of 0.12 ppm which was promulgated by EPA on Feb-

ruary 8, 1979 (44 FR 8202). Justification in the plan for an extension beyond the 1982 deadline is based upon a showing that the O_3 standard of 0.12 ppm cannot be achieved, despite expeditious implementation of reasonably available control measures.

The plan includes a graph representing emission reductions necessary to attain the O_3 standard by 1987. The plan does not provide for a quantitative demonstration of such emission reductions necessary to attain the standard. Further air quality analysis and further emission reduction control strategy analysis will be required in order to accurately justify the demonstration of attainment. The Air Resources Board (ARB) and local air planning agencies have committed to a plan of action by their resolutions of adoption of the plan which will provide for the attainment of the O_3 standard by no later than December 1987. The SIP revisions required to be submitted by July 1, 1982 must provide for a quantitative demonstration of attainment by the statutory date.

The plan does not include a local commitment to an emission reduction target for the transportation sector. The commitment to a target is an integral part of a demonstration of attainment and must be submitted by the State by July 1, 1980 in the annual report.

Carbon Monoxide (CO)

The plan includes an analysis projecting attainment of the CO standard by 1982. However, the analysis includes emission reduction credits for several mobile source tactics which may not be reasonably available. ARB has committed, through their resolutions of adoption of the plan, to

re-evaluate these tactics and determine which should be included in the plan and what emission reduction credit should be attributed to each tactic. The plan indicates that an SIP revision based on ARB's evaluation will be submitted to EPA during the summer of 1979. In addition, the State has determined that the analysis did not adequately address peak CO areas (or "hot spots") and that, therefore, significant doubt exists that the CO standard can actually be achieved by 1982. Based upon these facts, the State has requested an extension of the attainment date as provided for in Section 172(a)(2) of the Act. EPA agrees that an extension beyond 1982 is justified based upon a determination that the CO standard cannot be achieved despite the expeditious implementation of reasonably available control measures.

The ARB has committed to a plan of action by their resolutions of adoption of the plan which will provide for the attainment of the CO standard by no later than December 1987. Air quality and emission reduction control strategy reanalyses have been committed to in the continuing planning program for localized CO problem areas. The SIP revisions required to be submitted by July 1, 1982 must provide for a quantitative demonstration of attainment by the statutory date.

As with O_3, the CO plan does not include a local commitment to an emission reduction target for the transportation sector. This commitment must be submitted by the State by July 1, 1980 in the annual report.

Particulate Matter

The plan demonstrates that despite the application of reasonably available control technology (RACT) to all traditional sources and the annual geometric mean (AGM) primary TSP standard cannot be achieved by December 1982. However, the plan does not include a justification for the use of AGM data over 24-hour data. Since modeling must employ the design value which yields the lowest, most stringent allowable emission level capable of causing both primary standards to be attained, both design values should be included in the plan.

The plan indicates that fugitive dust emissions comprise a major portion of the TSP inventory. In such cases it is EPA policy that the plan contain a commitment and schedule to study nontraditional source control measures and a commitment to implement those found to be reasonable. The plan contains a commitment by the ARB to attain the TSP standard; however, the plan does not contain commitments to perform studies and to implement reasonably available control measures after study. If a schedule, commitments, and a justification for employing the AGM standard were included in the plan, a demonstration of attainment could be approved based on future implementation of nontraditional source control measures. This portion of the TSP plan could be approved conditioned upon the State's submittal of the commitments, schedule and justification by January 1, 1980.

The State requested an extension of 18 months for submittal of a plan showing attainment of the secondary TSP standard. This request appears to be consistent with

the provisions of 40 CFR 51.31, since the plan shows that attainment of this standard will require emission reductions greater than those that would result from the expeditious application of RACT.

Nitrogen Dioxide (NO^2)

Support documents to the plan contain analyses indicating that the area will be within 5-10% of attaining the NO_2 standard by December 1982. However, the State maintains that deficiencies in the data used for the attainment demonstration along with inaccuracies in the modeling used could be expected to significantly alter the attainment demonstration. The plan indicates that a reanalysis of the attainment demonstration is necessary. The State commits to such a reanalysis as well as the development of additional control measures necessary to attain the standard by December 31, 1982. This portion of the NO_2 plan could be approved conditioned upon the State's submittal by July 1, 1980 of the reanalysis and a revised demonstration of attainment.

3. Modeling/Level of Control

Ozone

On February 8, 1979, the 0.08 ppm standard for photochemical oxidant was superseded by the promulgation of the 0.12 ppm standard for ozone. While the local plan was developed to attain the 0.08 ppm standard. ARB amended the plan to reflect the effect of the revised 0.12 ppm standard. The ARB performed a city specific EKMA analysis. An EKMA analysis is appropriate for purposes of the 1979 plan. However, documentation of the choice of design value and the ratio of non-methane hydrocarbons to

nitrogen oxides was not provided. In addition, assumptions of meteorological transport of ozone into the air basin were not provided. This portion of the plan could be approved conditioned upon the State's submittal of this documentation by January 1, 1980. For the 1982 SIP revision mandated by the Act, modeling must be performed in accordance with EPA guidance.

Carbon Monoxide

The locally adopted plan uses basin-wide linear rollback modeling to calculate the emission reductions required to meet the CO standard. This is an acceptable screening method for estimating required reductions in emissions. In future modeling efforts, however, dispersion models conforming to EPA guidelines should be used to refine the analysis and identify the need for geographical (i.e. microscale) and seasonal specific control measures.

Particulate Matter

The locally adopted plan utilizes rollback modeling which is an acceptable technique for the 1979 SIP revision. However, the SIP submittal does not indicate that modeling produce an estimated reduction of emissions necessary to provide for attainment of the standards by December 1982. The State must submit modeling results which show necessary emission reductions to provide for attainment of the standards by December 31, 1982. In addition, the plan should include a rationale for the design value used to determine allowable emissions. Conflicting data in the support documents and the SIP submittal indicate that the current design value may be low. This portion of the TSP plan could be approved conditioned upon the State's sub-

mittal of documentation of the choice of design value and modeling results by December 1, 1980.

Nitrogen Dioxide

The locally adopted plan utilizes basin-wide rollback modeling which is an acceptable technique for the 1979 SIP revision. However, the SIP submittal does not indicate that modeling produced an estimated reduction of emissions necessary to provide for attainment of the standard by December 31, 1982. Modeling results which show necessary emission reductions to provide for attainment of the NO_3 standard by December 1982 are required. This portion of the plan could be approved conditioned upon the State's submittal of these modeling results by July 1, 1980.

4. Legally Adopted Measures/Schedules

The SIP submittal does not indicate that all necessary control measures have been adopted at the State or local level, as required by Section 172(b)(2), 172(b)(8), and 172(b)(10). Specifically, the plan fails to show adoption in legally enforceable form of the necessary reasonably available control technology (RACT) for volatile organic compound (VOC) sources, all reasonably available control measures including I/M, and for all other measures, either adopted control strategies or schedules and commitments for development, adoption, submittal, and implementation.

Ozone

The plan must include adopted regulations reflecting RACT for all applicable stationary source categories for which EPA had published a Control Technique Guideline (CTG) document by January 1978. As discussed in detail

in Item 14, adequate legally enforceable regulations for 7 of the CTG categories have not been submitted by the State. This is a major deficiency and must be remedied in order for EPA to approve the O_3 plan with respect to Part D of the Act.

The plan must include adoption of reasonably available control measures in legally enforceable form. An I/M Program is a reasonably available control measure and is provided for in the plan. However, due to the lack of legal authority to implement the I/M program due to the lack of State authorizing legislation, I/M cannot be considered to be adopted in legally enforceable form. This is a major deficiency and must be remedied in order for EPA to approve the O_3 plan with respect to Part D of the Act.

Of the other 17 transportation control measures identified in Section 108(f), the plan contains 7 measures that are presently found to be reasonable in San Diego County. However, there is no evidence in the plan that any of the 7 transportation control measures are currently adopted or committed for implementation in legally enforceable form. The requirements of Section 172(b)(10) are not met, since the plan does not include written evidence that the agencies identified as responsible for transportation related measures have adopted legally enforceable commitments to implement the necessary transportation control measures, nor have they established implementation schedules consistent with a demonstration of reasonable further progress. This portion of the O_3 plan could be approved conditioned upon the State's submittal of these commitments and schedules from the implementing agencies by January 1, 1980.

Carbon Monoxide

As discussed for O_3, the I/M program cannot be considered to be adopted in legally enforceable form and the CO plan cannot be approved with respect to Part D of the Act. As also discussed for O_3, the transportation control measures in the plan are not supported by commitments and schedules. This portion of the CO plan could be approved conditioned upon the State's submittal of commitments and schedules by January 1, 1980.

Particulate

The plan lacks written evidence of commitments to study nontraditional source control measures and implement all control measures found to be reasonable and necessary after such a study. As specified in Item 2, this portion of the TSP plan could be approved conditioned upon the State's submittal of the commitments and schedules by January 1, 1980.

Nitrogen Dioxide

The plan includes a commitment by the State to reanalyze the demonstration of attainment and to develop additional control measures necessary to attain the standard by December 31, 1982. However, the plan lacks written evidence of commitments in legally enforceable form to implement all necessary measures to provide for attainment by December 31, 1982. This portion of the NO_2 plan could be approved conditioned upon the State's submittal by July 1, 1980 of a list of the additional necessary measures and a commitment to implement those measures.

Supporting Regulations

The State has also submitted the following regulations which either implement control tactics included in the plan or are necessary to enforce such regulations:

Rule 2(t), Definitions.

Rule 11, Exemptions.

Rule 61.4, Transfer of Volatile Organic Compounds into Vehicle Fuel Tanks.

Rule 61.5, Visible Emission Standards for Vapor Control Systems.

These regulations have been evaluated, and EPA believes they should be approved for inclusion in the SIP, since they will strengthen and support existing control requirements.

40 CFR Part 52

In addition to the rulemaking actions discussed in this section, this notice proposes to remove certain Federally promulgated regulations from the Code of Federal Regulations, 40 CFR Part 52, which concern (in part) the San Diego area.

The following federally promulgated regulations or specified portions are proposed to be rescinded or amended because they have been replaced by the revised set of control measures/regulations contained in this plan and/or they have been invalidated by previous legal action:

A. § 52.233 *Review of new sources and modifications:* Rescind subsections (d)(7) and (g)(1)(vii) which will be replaced by a revised new source review regulation; ad-

ditionally rescind subsections (h), (i), and (j) which have been invalidated by the Clean Air Act Amendments of 1977.

B. § 52.238 *Attainment dates for national standards:* Revise dates in accordance with the submitted plan.

C. § 52.242 *Inspection and maintenance program.*

§ 52.243 *Motorcycle limitation.*

§ 52.244 *Oxidizing catalyst retrofit.*

§ 52.247 *Definitions for parking management regulations.*

§ 52.251 *Management of parking supply.*

§ 52.257 *Computer carpool matching.*

§ 52.258 *Mass transit priority—exclusive bus use.*

§ 52.259 *Ramp metering and preferential bus/carpool lanes.*

§ 52.266 *Monitoring transportation mode trends.* Rescind these regulations entirely because they have been invalidated by previous court action [*Brown v. EPA,* 521 F2d 827 (1975)].

D. § 52.269 *Control strategy and regulations: Photochemical oxidants (hydrocarbons) and carbon monoxide:* Rescind subparagraph (a) due to the revised attainment dates in the plan and in accordance with the Clean Air Act Amendments of 1977.

5. Emission Reduction Estimates

The plan includes estimated emission reductions for each adopted control tactic for 1980, 85, 90, 95 and 2000. However, estimates are not included for 1982 and/or 1987. If linear interpolation is intended, the State should so specify and should provide the proper interpolated numbers. Annual emission reduction estimates per control tactic, along with emission inventory projections for the attainment years of 1982 and/or 1987, are necessary to justify a demonstration of attainment and to served as a basis for a projection of reasonable further progress. It is recognized that emission reduction estimates may change as measures are more fully analyzed and implemented. As such estimates change, appropriate responses will be required to insure that the plan remains adequate to provide for attainment and for reasonable further progress. The State must provide EPA with estimated annual reductions per tactic per pollutant. This portion of the plan could be approved conditioned upon the State's submittal of such estimated reductions by January 1, 1980.

6. Reasonable Further Progress

Ozone

Figure 14-1 of the plan represents the annual incremental reductions needed for attainment by 1987. This representation is sufficient for the 1979 SIP revision and meets the requirements of Sections 172(b)(3) and 171(1) with respect to reasonable further progress. The annual report of reasonable further progress to be submitted by the State on July 1 of each succeeding year is expected to

refine the estimates of incremental reductions based upon updates of emission inventories, new analysis of control strategy effectiveness, and actual reductions being achieved through plan implementation. The July 1980 annual report submitted by the State must include refined assessments of reasonable further progress.

To demonstrate reasonable further progress with respect to the transportation sector, programs to directly monitor and report on implementation progress and the emission reduction effectiveness of each transportation control measure must be developed, described, and committed to pursuant to the EPA/Department of Transportation-Air Quality Planning Guidelines. Such a monitoring program must be in place and included in the 1980 annual report.

Carbon Monoxide, Particulate Matter and Nitrogen Dioxide

The provision of reasonable further progress in the plan appears to be consistent with the intent of Sections 172(b)(3) and 171(1) since the plan provides for regular incremental reductions needed for expeditious attainment. The July 1980 annual report submitted by the State must include refined assessments of reasonable further progress.

7. Emissions Growth

The plan must either provide an emission growth increment for the construction or modification of new major stationary sources or offset those emissions resulting from major new stationary source growth. The requirements of Section 172(b)(5) should be satisfied by the adoption and submittal of a New Source Review rule which requires emission offsets as an alternative to a reserved increment

of emissions growth for major new sources. (See Item 9 for further discussion.)

8. Annual Reporting

The plan must contain a commitment for annual reporting on the progress toward meeting the schedules discussed in Item 4 above; the growth of mobile sources, minor new stationary sources, major new or modified stationary sources; the reduction in emissions from existing sources to provide for reasonable further progress as in Item 6 above; and an updated emission inventory.

A commitment to such annual reporting is not included in the plan. This portion of the plan could be approved conditioned upon the State's submittal of such a commitment by January 1, 1980.

9. Permit Program

The ARB has submitted its Model New Source Review Rules and two letters from the ARB to local districts (letters dated March 12, 1979 and May 7, 1979) as draft rules for the purpose of meeting the requirements of Section 173. Thus, the term draft rules used here refers to the model rules as clarified by these two letters. These draft rules are not adopted in a legally enforceable manner as required by Section 172(b)(10) of the Act. Rather they are a model upon which a locally adopted and legally enforceable rule would be based.

The lack of an adopted new source review (NSR) rule is a major deficiency which must be corrected before EPA can approve or conditionally approve the permit program required by Sections 172(b)(6) and 173 of the Act.

Without an approved or conditionally approved permit program, the O_3, CO, TSP, and NO_2 plans cannot be approved or conditionally approved.

At the request of the State, and assuming that an adopted rule equivalent and similar to the draft rules will be submitted, EPA has reviewed the substance of the draft rules against EPA's existing requirements for a new source permitting program. These requirements are contained in guidelines as published in the preamble to EPA's revised Interpretative Ruling (IR) (44 FR 3274, January 16, 1979) and EPA's General Preamble for Rulemaking on Approval of State Implementation Plan Revisions for Nonattainment Areas (44 FR 20372, April 4, 1979).

The draft rules contain a problem with respect to the EPA requirements. This problem arises from the fact that a State may exempt from the NSR requirements of Part D of the Act major modifications of existing facilities (i.e. modifications of identifiable pieces of process equipment) at a source with accompanying offsets within the same source (intrasource offsets). This exemption would not apply, however, where a major modification to a source would include the addition, replacement or reconstruction (as defined, IR, Section II.A.9.) of a facility, regardless of any intrasource offsets. In this situation, lower achievable emission rates (LAER) must be applies to all new, reconstructed or replacement facilities. The draft rules are not consistent with this requirement in that the rules do not require LAER on new or reconstructed facilities which are part of a modification unless the modification would result in a net increase in emissions of 250 lbs/day or more.

The District of Columbia Court of Appeals recently issued an opinion which affected EPA's requirements for NSR, both for nonattainment and attainment areas. Subsequent to the court action, EPA published a notice of proposed rulemaking in the September 5, 1979 Federal Register (44 FR 51924) concerning NSR requirements. As described in that notice, EPA policy is generally to approve any plan that would meet the January 16, 1979 IR or the requirements set forth in the September 5th proposal. The draft rules contain certain provisions, such as the net increase allowance described above, which are less stringent than the IR and the recently proposed requirements. However, the draft rules are not clearly less stringent than either the IR or the September 5th proposal as they also contain provisions, including LAER and offset source cutoff levels, which are more stringent than those requirements.

Because of the uncertainty as to whether the draft rules meet either the IR or the recently proposed requirements, EPA intends to conditionally approve an adopted NSR rule equivalent to the draft rules when it is submitted in legally enforceable form. The conditions of this approval would be that the State must modify the adopted rule, and submit it as a SIP revision in accordance with EPA's final rulemaking action and within the statutory time limits.

10. Resources

The plan does not specifically identify and commit the financial and personnel resources necessary for plan implementation. The plan must provide commitments to these resources on the part of all implementing agencies to satisfy

the requirements of Sections 110(a)(2)(F) and 172(b)(7). This portion of the plan would be approved conditioned upon the State's submittal of these commitments within 6 months of EPA's final rulemaking.

11. Public and Government Involvement

The plan provides evidence of public, local government, and State involvement and consultation in the planning process and documents the process used in designating responsibility entities for preparing and implementing the revised SIP. A summary of public comments is included in the plan.

The plan identifies air quality, welfare, economic, energy, and social effects for all pollutants. Health effects of the plan provisions are not included in the plan as required by Section 172(b)(9). However, it appears that an adequate discussion of health effects exists in support documents. This portion of the plan could be approved conditioned upon the State's submittal of these documents by January 1, 1980.

12. Public Hearing

The plan meets the requirements of Section 172(b)(1) and 40 CFR 51.4 since it includes evidence that the plan was adopted by the State after reasonable notice and public hearing.

13. Extension Requirements

Since the State has requested an extension of the attainment date beyond December 1982 for O_3 and CO, the plan must meet the requirements of Sections 172(b)(11), 110 (a)(3)(D), and 110(c)(5)(B).

Under Section 172(b)(11)(A) the State must submit, in conjunction with the NSR permit program, a procedure and requirement for an analysis of alternative sites, sizes processes, and controls, which demonstrate that the benefits of a major emitting facility outweigh environmental costs. While the State has adopted a policy that the California Environmental Quality Act (CEQA) procedure is equivalent to that required by Section 172(b)(11)(A) of the Act, official submittal of relevant portions of CEQA as part of the plan is needed to satisfy the requirements of Section 172(b)(11)(A). This portion of the plan could be approved conditioned upon the State's submittal of the relevant portions of CEQA by January 1, 1980.

Under Section 172(b)(11)(B) the plan must establish a specific schedule for the implementation of an I/M program. The requirement of Section 172(b)(11)(B) has not been met since the State Legislature has failed to authorize the legal authority to implement such a program. Following passage of authorizing legislation, the State must submit a schedule for implementation of the I/M program to satisfy this requirement. This deficiency must be remedied in order for EPA to approve the O_3 and CO plans with respect to Part D of the Act.

Sections 110(a)(3)(D) and 110(c)(5)(B) require that the plan contain commitments by agencies with legal authority to establish, expand, or improve public transportation to meet basic transportation needs. These basic transportation needs must be met as expeditiously as practicable using Federal grants, State, and local funds to implement public transportation programs. Such commitments with respect to basic transportation needs are not included in

the plan. This portion of the plan could be approved conditioned upon the State's submittal of such commitments by January 1, 1980.

Section 172(b)(11)(C) requires that other measures (including but not limited to those listed in Section 108(f) of the Act) that may be necessary to provide for attainment of the NAAQS no later than December 31, 1987, must be identified in the plan. Although the plan identifies a number of measures, no schedules are included for the study of alternative packages of measures. Additionally, several Section 108(f) measures have not been analyzed and should be included in the plan for further study. Specifically these are: extended idling controls including controls on drive-through facilities, alternative engines and fuels, and fleet vehicle controls. This portion of the plan could be approved conditioned upon the State's submittal of an expanded list of measures including those specified above, and a schedule for analysis of the alternative packages of measures, by July 1, 1980.

Section 176(c) requires that the plan contain procedures for the determination of conformity of any projects, programs, or plans over which the Metropolitan Planning Organization has approval authority with the SIP. Furthermore, under Section 176(d) the plan must contain procedures to ensure that priority is given to the implementation of those portions of any programs with air quality related transportation consequences that contribute to the achievement and maintenance of the primary NAAQS. Specifically, these procedures should address the granting of priority to projects which contribute to the achievement and maintenance of the NAAQS. A description of these

procedures must be submitted by July 1, 1980 in the annual report.

14. Extension Requirements for VOC RACT

The plan indicates that attainment of the 0.12 O_3 standard is not possible by December, 1982. Therefore, the plan must contain adopted, legally enforceable regulations which reflect the application of reasonably available control technology (RACT) for those stationary source categories of volatile organic compounds (VOC) which exist within the San Diego County planning area for which EPA had published a Control Techniques Guidelines (CTG) document by January 1978 (i.e., Category 1 CTGs). In addition, the plan must contain a commitment to adopt RACT regulations for source categories to be covered by future CTG documents. The CTGs provide information on available air pollution control techniques, and certain recommendations of what EPA calls the "presumptive norm" for RACT.

The plan indicates that of the 15 source categories (addressed by eleven CTG documents) for which adopted regulations are required, only 11 exist in the nonattainment area. There are no petroleum refineries, large appliance manufacturers, magnet wire insulators, or auto assembly line coaters. The following regulations contain control requirements for 4 of the 11 categories (Service Station Stage 1 gasoline vapor recovery, bulk gasoline plants, bulk gasoline terminals and fixed roof tanks):

Rule 61.0 Definitions.

Rule 61.1 Receiving and Storing Volatile Organic Compounds at Bulk Plants and Bulk Terminals.

Rule 61.2 Transfer of Volatile Organic Compounds into Mobile Transport Tanks.

Rule 61.3 Transfer of Volatile Organic Compounds into Stationary Storage Containers.

Rule 61.7 Spillage of Volatile Organic Compounds.

These regulations have been submitted to EPA for inclusion in the SIP. Based on information contained in the CTGs EPA believes that the submitted regulations represent RACT, except for fixed roof storage tanks larger than 150,000 liters used to store petroleum liquid with a true vapor pressure greater than 1.5 pounds per square inch (psi) and with a Reid Vapor Pressure less than 3.0 psi. Lack of control requirements for these sources is not supported by the information in the CTG. The regulation for fixed roof storage tanks could be approved conditioned upon the State's submittal of one of the following within 90 days of EPA's final rulemaking: an adequate demonstration that the regulation for fixed roof tanks represents RACT, an amended regulation to be consistent with the CTG, or a demonstration that the regulation (Rule 61.3) will result in VOC emission reductions which are insignificantly different (within 5% of controlled emissions) from the reductions which would be achieved through implementation of the CTG recommendations for fixed roof tanks.

Regulations have not been submitted for the remaining 7 applicable source categories (solvent metal cleaning;

cutback asphalt; surface coating of cans, coils, paper, fabric, and metal furniture). The State, however, has submitted model rules applicable to each of these categories. The State has requested that EPA regard the ARB model rules as "draft rules" and review each of these rules for consistency with EPA statutory requirements. The State has indicated that they will submit adopted regulations which are as effective as the model rules during the next several months. Such adopted and legally enforceable regulations must be submitted before EPA can approve or conditionally approve the O_3 plan since these are significant emission sources in the San Diego area.

Based on information in the CTGs EPA believes the 7 model rules contain control requirements sufficient to fulfill the requirement for RACT. One minor problem exists with respect to the model rules. The model rules do not all contain compliance schedules which fulfill the requirements of 40 CFR 51.15. Although the model rules need not contain such schedules, adopted rules must. If the State submits adopted rules (after appropriate public hearings) similar and equivalent to the model rules with the problem corrected, the regulations for the above-mentioned 7 categories would be fully approvable. If the State submits adopted rules similar and equivalent to the model rules without the problem corrected, EPA could conditionally approve the problem regulations. Conditional approval would mean that the State would have to submit fully corrected rules by July 1, 1980.

Several of the model rules evaluated have control requirements for sources which are presently subject to the following two Federal Regulations: 40 CFR 52.252, "Con-

trol of Degreasing Operations" and 40 CFR 52.253, "Metal Surface Coating Thinner and Reducer." If the State submits adequate regulations for sources subject to these regulations, the Federal regulations applicable to such sources would only remain in effect until such time as the newly revised regulations become effective and the source achieves full compliance with its provisions.

As stated above, the plan must contain a commitment to adopt RACT regulations for source categories to be covered by future CTG documents. The plan contains a resolution to adopt all other reasonably available control measures needed to attain the standards as expeditiously as practicable. The State must submit adopted regulations by July 1, 1980 for the following applicable source categories (Category II CTGs): Petroleum refinery leaks, gasoline tank trucks, perchloroethylene dry cleaning, pharmaceutical manufacture, miscellaneous metal parts and products, graphic arts, pneumatic rubber tire manufacture, flatwood paneling and floating roof tanks.

Public Comments

Under Section 110 of the Clean Air Act, as amended, and 40 CFR Part 51, the Administrator is required to approve or disapprove revisions to the SIP submitted by the State. This proposal also includes draft volatile organic compound regulations and a draft new source review regulation which have been adopted as model rules after public hearing by the State. All of these model rules have not yet been adopted and submitted to EPA by the State as legally enforceable regulations. However, the State has requested EPA to review these model rules and invite public comment on whether these draft regulations meet the require-

ments of Part D of the Clean Air Act. EPA may proceed to final rulemaking without providing further opportunity for public comment if the State adopts and submits regulations equivalent to these model rules. The Regional Administrator hereby issues this notice setting forth the above described revisions, as proposed rulemaking and advises the public that interested persons may participate by submitting written comments to the Region IX Office.

The EPA Region IX Office specifically invites public comment on whether to conditionally approve the items identified in this notice as deficiencies in the nonattainment area plan. EPA is further interested in receiving comment on the specified deadlines for the state to submit the corrections, in the event of conditional approval.

Comments received within 30 days after publication of this notice, November 5, 1979, will be considered. Comments received will be available for public inspection at the EPA Region IX Office and at the locations listed in the Addresses Section of this notice.

The Administrator's decision to approve, conditionally approve, or disapprove the proposed revisions will be based on the comments received and on a determination whether the revisions/scheduled revisions meet the requirements of Section 110(a)(2) and Part D of the Clean Air Act and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of State Implementation Plans.

EPA believes the available period for comments is adequate because:

(1) The plan has been available for inspection and comment since July 31, 1979.

(2) EPA's notice published in the July 31, 1979 Federal Register (44 FR 44907) indicated that the comment period would be 30 days; and

(3) EPA has a responsibility under the Act to take final action as soon as possible after July 1, 1979 on that portion of the SIP that addresses the requirements of Part D.

Under Executive Order 12044 EPA is required to judge whether a regulation is "significant" and therefore subject to the procedural requirements of the Order or whether it may follow other specialized development procedures. EPA labels these other regulations "specialized". EPA has reviewed the regulations being acted upon in this notice and determined that they are specialized regulations not subject to the procedural requirements of Executive Order 12044.

(Section 110, 129, 171 to 178 and 301(a) of the Clean Air Act as amended (42 U.S.C. §§ 7410, 7429, 7501 to 7508, and 7601(a)).)

Dated: August 29, 1979.

Paul DeFalco,

Regional Administrator.

Appendix 19

WESTERN UNION

Telegram

SZA188(2201)(1-031023C250)PD 09/07/79 2155

ICS IPMWDWA WSH

06149 Washington DC 379 09-07 732P EDT

PMS Honorable John V Briggs

California State Senate Dlr

State Capitol

Sacramento CA 95814

Dear Mr. Briggs:

I understand that numerous questions have been raised in recent weeks with respect to the legal requirements of the Clean Air Act Amendments of 1977 regarding vehicle inspection and maintenance (I/M) programs. The Clean Air Act of 1977 is explicit: EPA must disapprove the California SIP under Part D of the Act absent legal authority (Section 172(B)(10)) and a specific schedule for implementation of a vehicle inspection and maintenance program (Section 172(B)(11)(B)) in areas of California where I/M is required. EPA cannot accept less than full legislative authorization to implement an I/M program. A time extension for certification of legal authority is only available in the exceptional case where a legislature has not had adequate opportunity to consider necessary legislation. Clearly this is not the case in California.

EPA, therefore, cannot approve the California plan based on a legislative resolution for further studies and a request for a time extension in lieu of actual legislative

authorization. EPA also cannot approve the California plan based on the existing limited change-of-ownership program, because that program cannot achieve emission reductions which are reasonably available from an I/M program.

Until there is an approved plan, the Act's required prohibition on construction or modification of major sources in California cannot be terminated. This prohibition must, under law, remain in effect from July 1, 1979, until such time as the requirements of Part D of the Act, including vehicle inspection and maintenance programs are approved.

In addition, absent continuing reasonable efforts to satisfy the Clean Air Act requirements of Part D, EPA would be required to initiate proceedings to invoke limitations on federal financial assistance for certain transportation projects in certain areas of California. Limitations on federal financial assistance for wastewater treatment facilities may also be considered.

These are results that we at EPA are anxious to avoid in California as in other states. However, the prohibition in California on construction and modification of major sources cannot be avoided unless California adopts the necessary legal authority for I/M as numerous other states have already done.

I would be happy to make available agency representatives in Sacramento to help you in resolving any issues

that may arise in developing the necessary I/M legal authority.

Sincerely yours

David G Hawkins
Assistant Administrator
for Air Noise and Radiation

Identical telegrams sent to:

Honorable Albert S. Rodda
Chairman, Senate Finance Committee
California State Senate

Honorable Lee T. McCarthy
Speaker
California State Assembly

Honorable James R. Mills
President Pro Tem
California State Senate

Honorable John F. Foran
California State Senate

Honorable Walter Ingalls
Chairman
Assembly Committee of Transportation
California State Assembly

Appendix 20

Solomon E. Robinson
Assistant United States Attorney

Barbara H. Brandon
Jose A. Allen
Attorneys, Pollution Control Section
Land and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-5270
Attorneys for Defendants

In the United States District Court
For the Eastern District of California

Civil No. S-79-925 LKK

Pacific Legal Foundation, et al.,
Plaintiffs,

vs.

Douglas M. Costle, et al.,
Defendants.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Of Counsel:
Bruce Diamond, Esquire
James Cahan, Esquire
Eric Smith, Esquire
David Stromberg, Esquire
Attorneys, Environmental Protection Agency

I. INTRODUCTION

The Pacific Legal Foundation (PLF) and thirteen named members of the California State Legislature commenced this action on December 3, 1979, against the Administrator and Regional Administrator of the Environmental Protection Agency. Plaintiffs alleged that the Administrator had unlawfully imposed restrictions on the construction or modification of major sources of pollution and threatened to impose limits on federal funds otherwise payable to California. The Administrator's actions, plaintiffs contended, were designed to coerce the state legislature to adopt laws to implement an inspection and maintenance program for automobiles. In the plaintiffs' view, the Administrator's objective, and the means he chose to advance his objective, were in excess of his statutory authority under the Clean Air Act, 42 U.S.C. §§ 740 *et seq.*, and repugnant to Article IV, Section 4, and the Tenth Amendment to the United States Constitution. Accordingly, plaintiffs sought a preliminary injunction to enjoin the Administrator from enforcing construction restrictions or imposing any other sanctions on the State of California. On January 24, 1980, this Court held a hearing on plaintiffs' request for preliminary relief and denied the same on March 10, 1980. On August 12, 1980, the Court of Appeals for the Ninth Circuit affirmed this Court's decision.

Plaintiffs have again returned to this Court for relief, this time seeking a partial summary judgment in their favor and a mandatory injunction ordering the Administrator to promulgate and implement a federal implementation plan for California. As will be demonstrated below, the Court should deny plaintiffs' motion for summary judg-

ment because the Administrator has not breached any duty, mandatory or otherwise, under section 110(c) of the Clean Air Act, 42 U.S.C. § 7410(c).

II. STATEMENT OF THE CASE

A. Statutory Provisions Involved

The statutory framework of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* is discussed at length in Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, pages 3-10. Therefore, we will not repeat that discussion here. However, there are a few provisions in the 1977 amendments to the Act which merit reiteration here.

In brief, Congress, in adding Part D of Title I of the Act, 42 U.S.C. §§ 7501-7508, required states to submit revised state implementation plans (SIPs) designed to meet new deadlines for attaining and maintaining national ambient air quality standards (NAAQS). Congress established new deadlines because many areas of the country ("non-attainment areas") had failed to attain the NAAQS by the deadlines originally established in the Clean Air Act Amendments of 1970. Therefore, Congress gave states to December 31, 1982, to attain the NAAQS for all pollutants, and, if states met certain additional requirements, authorized the Administrator to grant further extensions to December 31, 1987, to attain the NAAQS for ozone and carbon monoxide. Section 172(a), 42 U.S.C. § 7502(a).

Under the scheme envisioned by Congress, states were to submit their revised SIPs ("Part D SIPs") by January 1, 1979; section 129(c), note under text of 42 U.S.C. § 7501; and the Administrator would approve them by July 1, 1979.

Because Congress recognized that some slippage in meeting the statutory timetables was likely to occur, and in order to prevent air quality from deteriorating during the interim period between a state's development and submission of a Part D SIP and the Administrator's final approval of the state's plan, Congress enacted a statutory prohibition on the construction or modification of any major stationary source of air pollution located in a nonattainment area lacking an approved Part D SIP, and required that a similar prohibition be a part of each state's SIP.[1] Section 110(a)(2)(I), 42 U.S.C. § 7410(a)(2)(I). Congress provided that the prohibition on construction would go into effect on July 1, 1979, if, as of that date the Administrator had not approved a state's Part D SIP.

In order to receive an extension to December 31, 1987, for meeting the carbon monoxide and ozone standards, a state must demonstrate to the Administrator's satisfaction that it is not possible to attain either or both standards in a relevant nonattainment area before December 31, 1982, "despite implementation of all reasonably available measures . . . ." Section 172(a)(2), 42 U.S.C. § 7502(a)(2). If the state makes such a demonstration, it must, among other things, "establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program . . . ." Section 172(b)(11)(B), 42 U.S.C. § 7502(b)(11)(B). Furthermore, the state is required to pass legislation by January 1, 1979, necessary to implement the inspection and maintenance (I/M) program, and

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[1]The prohibition applies to sources which emit the particular pollutant for which the area has been designated as nonattainment.

to implement the program "as expeditiously as practicable" but not later than December 31, 1982. Sections 172(b)(2), 172(b)(10) and 172(b)(11)(B), 42 U.S.C. § 7502(b)(2), § 7502(b)(10) and § 7502(b)(11)(B).

B. Administrative Actions

For purposes of dealing with its air pollution problems, California has divided itself into 14 air basins. See *Affidavit of Douglas Grano*, filed herewith. Within each air basin the state is further divided into air pollution control districts which correspond to the boundaries of the state's political subdivisions. On March 3, 1978, the Administrator designated several areas as nonattainment for carbon monoxide and ozone. 43 Fed. Reg. 8962, 8970-75 (1978). For the most part, these designations corresponded either to existing air basins or pollution control districts, or portions thereof. *Id.* 8972-74 (1978).

Because preparation of a SIP is complex, California (and most states) has been late in submitting to EPA for approval a Part D SIP for the designated nonattainment areas. Since 1979, however, the state has been submitting various portions of its plan for an entire air basin or portion thereof. *Grano Affidavit.* In turn, EPA has proposed action on all portions of the plan that it has received. *Id.*

With regard to the portions of the plan pertaining to the San Diego, Bay Area and South Coast Air Basins, the Sacramento metropolitan area, and Fresno and Ventura Counties, EPA has proposed to disapprove those submissions because of the lack of legal authority to implement an I/M program in those areas. *Id.* However, EPA has not

yet taken final action on any aspect of the plan. *Id.* More recently, EPA has proposed to withhold federal funds to California pursuant to section 176 of the Act, 42 U.S.C. § 7506, because the state has not adopted the necessary legal authority for an I/M program. 45 Fed. Reg. 59180 (1980). Because of the consequences of a restriction on federal funding pursuant to section 176 of the Act, 42 U.S.C. § 7506, EPA has provided a 45-day comment period on its proposed action.[2]

III. ARGUMENT

Rule 56(c) of the Federal Rules of Civil Procedure authorizes the Court to grant a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Although there is little or no factual dispute in this case with regard to the status of California's Part D SIP submission and EPA's action on it, there is a deep dispute over whether the Administrator has a mandatory duty at this point to promulgate a federal SIP for California. Plaintiffs' motion for partial summary judgment should be denied because the Administrator has no mandatory duty under the facts and circumstances of this case to promulgate a federal SIP for the State of California.

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[2]After the agency has taken final action under section 176, its decision will be reviewable in the Ninth Circuit Court of Appeals pursuant to the judicial review provisions of section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1).

A. Because the Administrator Has Made No Final Determination That California's Part D SIP Does Not Comply With the Requirements of the Clean Air Act, Section 110(c)(1)(B) of the Act Does Not Require Him to Promulgate a Federal SIP

Plaintiffs argue that the Administrator has a mandatory duty under section 110(c) of the Act, 42 U.S.C. § 7410(c), to promulgate a suitable revised SIP for the State of California because the state has chosen not to participate in the air pollution control scheme created by Congress. By this assertion, plaintiffs imply that California has simply decided to walk away from the requirements of the Act and has made no effort to adopt and submit a Part D SIP. As discussed previously, however, California has devoted and is devoting a considerable amount of effort to developing a Part D SIP. In fact, the state has submitted a Part D SIP for all nonattainment areas in the state and EPA has proposed action on each aspect of the plan. Because of the present lack of legal authority to implement a I/M program, EPA has proposed to disapprove the state's plan for attaining the carbon monoxide and ozone standards by 1987. Therefore, plaintiffs paint with too broad a brush when they suggest that the state has not submitted a Part D SIP. More accurately, a plan has been submitted, but the agency has indicated that it is deficient because of the lack of legal authority to implement an I/M program.

Section 110(c)(1), 42 U.S.C. § 7410(c)(1), authorizes the Administrator to promulgate an implementation plan (or a portion thereof) if a state fails (1) to submit plan; or (2) the Administrator determines that the plan submitted

does not comply with the requirements of section 110; or (3) the state fails to revise its plan within 60 days (or such longer period as the Administrator may prescribe) of the Administrator's determination that the plan is in need of revision.[3] Cf., *New England Legal Foundation* v. *Costle,* 475 F. Supp. 425 (D.Conn. 1979).

Plaintiffs apparently believe that the lack of a I/M program is sufficient, without more, to trigger the Administrator's responsibility under section 110(c)(1) to promul-

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[3]Section 110(c)(1), 42 U.S.C. 7410(c)(1), provides:

> (c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> (A) the State fails to submit an implementation plan which meets the requirements of this section,
>
> (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).
>
> If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

gate a SIP for California.[4] However, plaintiffs do not identify which clause in subsection 110(c)(1) they rely on to support their assertion that the Administrator has a mandatory duty to promulgate a federal SIP. Because California has already submitted a plan, albeit one which EPA has preliminarily identified as deficient in certain respects, clause (B) of subsection 110(c)(1) is the only one that could possibly be applicable here.[5] And under this clause, the Administrator's authority to substitute a federal plan in place of a state-submitted SIP comes into play only if "[t]he plan, or any portion thereof . . . is *deter-*

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[4]It is not clear whether plaintiffs are demanding that EPA promulgate an entire Part D SIP for the California, or whether they believe that EPA need promulgate only the I/M portion of the plan. We assume that the latter is the case, since, as discussed above, the principal shortcoming in California's plan is the lack of statutory authority to implement and enforce an I/M program. EPA has preliminarily determined that the other aspects of the plan are approvable; therefore, it would make littte sense to discard the approvable portions of the plan and replace it with a federal plan simply because a portion of the state plan is deficient.

[5]Clause (A) does not apply because it is intended to cover an instance in which a state submits no plan at all. If clause (A) of subsection 110(c)(1) were construed to embrace a situation in which the plan submitted fails to comply with the requirements of the Act, then clause (B) would be rendered mere surplusage because that clause is also intended to cover the same situation. *Compare* section 110(c)(1)(A) with section 110(c)(1)(B). One of the "cardinal-rules" of statutory construction is that "if possible effect should be given to every clause and part of a statute." *Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Ex parte the Public National Bank of New York*, 278 U.S. 101, 104 (1928). Defendants' construction of the statute gives effect to each clause in subsection 110(c)(1). Clause (C) is not applicable either because California does not yet have an approved Part D SIP which the Administrator has determined is in need of revision.

mined by the Administrator not to be in accordance with the requirements of . . . section [110]." 42 U.S.C. § 7410(c)(1)(B). Therefore, even assuming *arguendo* that the Administrator has a mandatory duty to promulgate a federal SIP to correct the deficiencies in California's Part D SIP, such a duty is triggered only after he determines that the state's plan, or any portion thereof, does not comply with the relevant requirements of the Act.

However, the Administrator has made no final determination that California's Part D SIP is deficient; thus, whatever duty exists under section 110(c)(1)(B), whether mandatory or otherwise, has not yet arisen. And no such duty will arise until the Administrator has taken final action either to approve, conditionally approve or disapprove California's Part D SIP.

Nor can it be argued that the Administrator's preliminary determination with regard to the deficiencies in California's plan adequately substitutes for the formal, final determination contemplated by section 110(c)(1)(B). The Administrator's determination that a state's plan fails to satisfy the requirements of the Act is simply another way of saying that the he has disapproved the state's submission. And it is beyond dispute that a final conclusion of this sort may be made only after EPA has complied with the procedural requirements of section 553 of the Administrative Procedure Act, which provide that the agency must give interested persons an opportunity to participate in rulemaking proceedings through submission of written comments, and obligate the agency to "incorpor-

ate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553.

Because the notices of proposed rulemaking on California's Part D SIP marked only the beginning and not the end of EPA's rulemaking action on the plan, the Administrator's preliminary determination that California's Part D SIP is deficient may not be used as the basis for triggering the Administrator's authority under section 110(c)(1)(B) to promulgate a federal SIP.[6]

B. The Administrator Properly Has Determined That a Federal SIP Should Not Be Promulgated at This Time For California

Plaintiffs' assertion that the Administrator's mandatory duty to promulgate a federal Part D SIP arises immediately upon a state's failure to adopt its own plan may be appealing in its simplicity, but it ignores the strongly expressed Congressional desire that the states and local gov-

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[6]There is also another reason for concluding that the Administrator's notice of proposed action should not be used as a final determination that California's plan is deficient. Section 307(b) of the Act, 42 U.S.C. § 7607(b), provides for judicial review in the Ninth Circuit Court of Appeals of the Administrator's disapproval of the state's Part D SIP. Any such action, however, must be filed within sixty days of the date that the Administrator publishes notice of his disapproval in the *Federal Register*. Section 307(b)(1), 42 U.S.C. § 7607(b)(1). If this Court were to treat EPA's notice of proposed rulemaking as a final determination that California's Part D SIP is deficient, interested persons would be effectively precluded from obtaining judicial review of this determination in the court of appeals because more than sixty days have passed since some of the notices of proposed action were published in the *Federal Register*.

ernments be given the primary role in implementing the Clean Air Act, and the legislative and judicial backdrop against which Congress acted when it grappled in 1977 with the issue of I/M programs. Furthermore, plaintiffs' wooden reading of section 110(c)(1) of the Act, 42 U.S.C. § 7410(c)(1), overlooks the measures Congress adopted to induce states to adopt and enforce their own I/M programs.

The basic structure of the Act indicates that it is premised on the notion that states have the primary responsibility for implementing pollution control programs. In section 101(a)(3), 42 U.S.C. § 7401(a)(3), Congress declared: "Congress finds . . . that the prevention and control of air pollution at its source is the primary responsibility of States and local governments. . . ." Furthermore, in describing the purposes of Title I of the Clean Air Act, Congress stated: "The purposes of this title are . . . to provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution programs." Section 101(b)(3), 52 U.S.C. § 7401(b)(3). Congress thus envisioned that states would take the lead in developing and enforcing air pollution control programs and the Administrator would take a "backseat" in the process. *Id.*

Congress chose to encourage states and local governments to take the lead because it recognized that those governmental entities were better positioned to grapple with the difficult problems of air pollution. S. Rep. No. 95-127, 95th Cong., 1st Sess. at 10 (1977). But in order to ensure that its goal of clean air was not frustrated, Con-

gress also empowered the Administrator to promulgate a federal SIP if a state defaulted on its responsibilities under the Act. Section 110(c), 42 U.S.C. § 7410(c). However, despite the power Congress vested in the Administrator under section 110(c), 42 U.S.C. § 7410(c), it fully intended that the power be used sparingly in order to avoid displacing a state's efforts at pollution control.[7]

That cooperation and not confrontation is the only workable means of implementing the provisions of the Clean Air Act is best exemplified by EPA's experience in attempting to compel states to administer federally promulgated transportation control programs under the 1970 amendments to the Act. Because the state and federal governments were relatively inexperienced in the area of transportation control planning for motor vehicle related pollutants, the Administrator originally decided to defer the deadline for submission of transportation control portions of the state plans for two years. *See generally* 37 Fed. Reg. 10842; 38 Fed. Reg. 30625. The Court of Appeals for the District of Columbia set aside this decision, as contrary to the requirements of the Act. *NRDC v. EPA*, 475 F.2d 968

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[7]EPA has utilized section 110(c) few times since 1970, reflecting the agency's interpretation of Congress' intention that federal promulgation be used sparingly. The first such promulgation involved the establishment, under section 110(c), of federally-imposed automobile inspection and maintenance requirements on a number of states. As discussed more fully below, this was largely stricken by the courts. *Infra* at 11-12. The agency also promulgated a federal SO_2 SIP for the State of Ohio, in the face of the state's refusal to do so. *See Cleveland Electric Illuminating Co. v. EPA*, 572 F.2d 1150 (6th Cir. 1978), *cert. denied* 439 U.S. 910 (1978); *Republic Steel Corp. v. Costle*, No. 78-3204 etc., (6th Cir., April 17, 1980).

(D.C. Cir. 1973). The Administrator then ordered the states to submit transportation control plan amendments to their SIPs to EPA for review. When some states did not submit these amendments, the Administrator promulgated federal transportation control plans for those states.[8]

These federally promulgated regulations directed the states to adopt and implement a number of transportation control measures, such as limitations on parking, exclusive bus and carpool lanes, and restrictions on the use of heavy duty and commercial vehicles. The states were also required to develop an inspection and maintenance program for motor vehicles, and to adopt any necessary legislation to implement that program. As part of the effort to gain state compliance, the Administrator threatened to bring enforcement actions directly against state officials under section 113 of the Act, 42 U.S.C. § 7413, seeking injunctive relief, civil contempt, fines, and other judicial actions if the states failed to implement the federal plans.

EPA's efforts to promulgate transportation controls in this manner were met by strong resistance. Several states challenge EPA's authority under the Clean Air Act and the Constitution to require the states to adopt specified transportation control plans through the threat of enforcement actions directly against state officials, and most of the courts agreed with the states. *See e.g., Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) ("Brown I"); *vacated and re-*

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[8]A detailed history and analysis of these provisions is provided in Battle, *Transportation Controls under the Clean Air Act—An Experience in (Un)cooperative Federalism*, 15 Land and Water L. Rev. 1 (1980). A copy of this article was previously supplied to the court.

manded EPA v. *Brown*, 431 U.S. 99 (1977), *on remand, Brown* v. *EPA*, 566 F.2d 665 (1977) ("Brown II"); *State of Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded sub nom, EPA* v. *Brown*, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated and remanded, sub nom, EPA* v. *Brown*, 431 U.S. 99 (1977); *on remand District of Columbia* v. *Costle*, 567 F.2d 1091 (D.C. Cir. 1977). *But see Commonwealth of Pennsylvania* v. *EPA*, 500 F.2d 246 (3rd Cir. 1974), holding that EPA did have authority to order states to adopt transportation control strategies. *See also Friends of the Earth* v. *Carey*, 552 F.2d 25 (2nd Cir. 1977).[9]

It was against this fractious background that Congress took up the 1977 amendments to the Clean Air Act. Congress was well aware of the resistance EPA had encountered in its attempt to promulgate federal transportation control programs for the states. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. at 286-288 (1975). Therefore, both Houses stressed the need to encourage states to adopt and implement voluntarily their own transportation control programs, particularly the I/M aspect of that program.

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[9]With the exception of *Pennsylvania v. EPA, supra,* these cases were vacated by the Supreme Court as moot after the Administrator stated that the federal regulations had to be modified to remove certain regulations (such as those requiring review of parking facilities), and to remove the requirement that the state adopt laws. *EPA v. Brown*, 431 U.S. 99 (1977). On remand, the Ninth Circuit Court of Appeals again held EPA lacked statutory authority under the 1970 Act to bring enforcement actions against the states for failure to implement the federally promulgated SIP requirements involved in that case. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977) (Brown II).

For example, the Senate Committee on Environment and Public Works stated that it designed the transportation control aspects of the 1977 Amendments "to preserve maximum flexibility to take into account varying local and regional conditions." S. Rep. 95-127, *supra*, at 40 (1977). This approach reflected the Senate's common sense appreciation for the fact that "[t]he Federal Government does not have and will not have the resources to do an effective job of running the air pollution control programs of the State." *Id.*

The House, after reviewing the judicial history of the difficulties encountered by EPA in attempting to force control programs on the states, stated: "[T]his is a delicate area of federal-state relations. Clearly, a careful balance is required as a matter of wise legislative policy, if not as a matter of constitutional requirement." H.R. Rep. No. 95-294, *supra* at 288. The House therefore concluded that the wisest course was to adopt an approach that "involv[ed] the least possible intrusion into State affairs consistent with the primary task of protecting public health." *Id.* And even though the House stated that if a state failed or refused to adopt an I/M program the Administrator would be required to promulgate one, it made plain that the "most preferabl[e]" course would be for the state to "agree voluntarily to implement and enforce the I/M program." *Id.* at 290.[10]

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[10]Although plaintiffs liberally quote the portion of the House report referring to the Administrator's authority to promulgate a federal plan, they conveniently omit mention of Congress' expressed preference for inducing the states to adopt their own I/M programs. PLF Br. at 6.

In fact, of the six options listed in the House Committee report for enforcing and implementing an I/M program, federal promulgation of such a program ranked fourth, outranking only the options of seeking injunctive relief under section 113 of the Act, 42 U.S.C. § 7413, and a "combination of the [options listed] above." H. Rep. No. 95-294, *supra* at 290. It should also be noted that the option of federal promulgation was recommended only "if feasible." *Id.*

The leading option proposed by the House Committee as the means for getting a state to adopt and enforce an I/M program in the face of the state's default was the option of "inducing the State to do so, by offering grants under section 210 of the Act [42 U.S.C. § 7544] or by withholding part of a State program grant under section 105 of the Act [42 U.S.C. § 7405] or by such other means as have been held permissible by the Court in *District of Columbia* v. *Train* . . . ." H.R. Rep. No. 95-294, *supra* at 290.

Recognizing that the Administrator needed more effective tools to induce states to act, the entire Congress adopted the House approach. Prompted by the suggestions in several court decisions that conditioning the expenditure of federal funds would be both a useful and constitutionally legitimate incentive for state participation, Congress authorized such withholdings. H.R. Rep. No. 95-294, *supra*, at 286-291. Section 176(a), 42 U.S.C. § 7506(a), provides that where transportation control measures are needed and a plan with all of the necessary elements has not been submitted by July 1, 1979, or reasonable efforts to submit such a SIP have not been made, EPA "shall not approve"

grants otherwise authorized by the Clean Air Act and the Secretary of Transportation shall not award certain highway grants.[11] Furthermore, under section 316(b), 42 U.S.C. § 7616(b), grants for sewage treatment works may be withheld if the state does not have a SIP which is approved and accounts for the direct or indirect increases in air pollution caused by the sewage works or the residential or commercial growth the sewage would create.

Thus, in light of the additions of section 176 and 316 to the Act, 42 U.S.C. §§ 7506 and 7616, the Administrator's authority to promulgate a federal I/M program is not the remedy at this time for California's failure to adopt its own program. On the contrary, Congress intended that the tools provided in sections 176 and 316 would be used before the Administrator resorted to the more drastic remedy of federal promulgation. *See* H.R. Rep. No. 95-294, *supra* at 290.

The California Legislature recently adjourned without providing legal authority for the state's pollution control agencies to implement and enforce an I/M program. Therefore, the Administrator, pursuant to his statutory authority, has begun the section 176 process of withholding federal funds. However, the process has not yet run its course because he has only recently proposed to withhold such funds. 45 Fed. Reg. 59180 (1980).

The Administrator should be permitted to make full use of this Congressionally authorized tool before com-

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[11]Grants for "safety, mass transit or transportation improvement projects related to air quality improvement or maintenance" are exempt from the restriction. Section 176(a), 42 U.S.C. § 7506(a).

mencing the process of federal promulgation, because federal promulgation of an I/M program, apart from possibly reopening recently-healed wounds, would be extremely disruptive, both for the state and EPA. First, transportation control planning, including I/M, is a matter of peculiarly amenable to local action. The federal government simply is in no position to take into account all the specific concerns that might be involved or to resolve the problems that might arise, particularly those pertaining to local use and transportation planning. In fact, California itself appreciates the localized nature of transportation controls and that is why pollution control planning is performed at the local level, with state agencies providing oversight.

Second, EPA would have to start anew the entire process of transportation planning. The resources already expended by the state and local governments would be wasted; federal planners, responsive to federal concerns would have to take up the task of deciding what is the best I/M plan for California.

Finally, EPA does not have the resources to Administer a federal I/M program, especially one that is likely to encounter substantial resistance from the public and the state. Congress has neither appropriated the funds nor allocated the positions necessary to administer such a I/M program.[12]

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[12]It was in recognition of all the problems associated with federal promulgation that Congress enacted sections 176 and 316 of the Act, 42 U.S. §§ 7506 and 7616. *See* S. Rep. No. 95-127, *supra* at 37-38.

Pursuing the 176 option instead of going forward with a federal promulgation gives the state additional time to act on an I/M program. As explained in the *Affidavit of Mary Nichols*, filed herewith, the present state administration intends to submit another I/M bill at a special legislative session in December. In addition, the Chairman of the Assembly Committee Transportation of the California legislature has indicated in a letter to EPA that the Assembly Committee will convene a hearing on October 14, 1980, to discuss the need for an I/M program. See letter dated September 25, 1980 from Walter M. Ingalls to Hugh Miller, a copy of which is attached to the *Affidavit of Hugh Miller*. If California acts quickly and passes the necessary legislation, an adequate I/M program could be implemented and put into effect to far more quickly and efficiently than any program EPA could devise, and, in all probability, would also be superior to any federally-imposed program.

Therefore, it is entirely consistent with Congressional intent and the statutory scheme of the Clean Air Act for the Administrator to allow California another opportunity to adopt an I/M program and to defer any steps toward federal promulgation of such a program, while proceeding apace with the section 176 process. To adopt plaintiffs' suggested course of action—i.e. immediate federal promulgation of a federal I/M program—would upset the delicate balance Congress sought to achieve by the 1977 amendments to the Act. The Administrator, mindful of Congress' goal, has chosen to utilize the other tools in the Act for inducing state action.

In view of the legal and legislative history outlined above as well as the particular circumstances of this case, the Court should not order the Administrator to promulgate a federal I/M program. Instead, the court should defer to the Administrator's decision to give the California legislature additional time to adopt an I/M program designed to meet the state's particular needs.

IV. CONCLUSION

For the reasons discussed above, this Court should deny plaintiffs' motion for partial summary judgment.

Respectfully submitted,

/s/ BARBARA H. BRANDON
Barbara H. Brandon
Jose R. Allen
Attorneys, Pollution Control Section
Land and Natural Resources Division
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 633-5270

Of Counsel:
Bruce Diamond, Esquire
Eric Smith, Esquire
James Cahan, Esquire
David Stromberg, Esquire
Attorneys, Environmental Protection Agency

No. 80-828

In the Supreme Court of the United States

OCTOBER TERM, 1980

PACIFIC LEGAL FOUNDATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

DIRK D. SNEL
JOSHUA I. SCHWARTZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to review a temporary moratorium, announced in a regulation promulgated by the Environmental Protection Agency, on construction of certain major sources of air pollution in highly polluted areas of California, where the Clean Air Act vests exclusive jurisdiction to review regulations and any other final agency action of EPA in the court of appeals.

2. Whether the district court abused its discretion in concluding that petitioners had not demonstrated a probability of success on their claim that provisions of the Clean Air Act which authorize the limitation of federal grant funds to state agencies that do not participate in particular related federal regulatory programs are unconstitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-25 to A-32) is reported at 627 F.2d 917. The order of the district court (Pet. App. A-1 to A-24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1980. Rehearing was denied by the court of appeals on October 2, 1980 (Pet. App. A-33). The petition for a writ of certiorari was filed on November 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Under Section 109 of the Clean Air Act, 42 U.S.C. (Supp. I) 7409, the Administrator of the Environmental Protection Agency is responsible for establishing two sets of nationwide air quality standards. The "primary" standards, designed to protect the public health, were to be achieved no later than 1975. 42 U.S.C. (1976 ed.) 1857c-5(a)(2)(A); see *Train* v. *NRDC*, 421 U.S. 60, 64-67 (1975). Each state was required to submit to the Administrator for approval a state implementation plan (SIP) for "implementation, maintenance, and enforcement" of the air quality standards for every portion of the state. 42 U.S.C. (Supp. I) 7410(a)(1). If the Administrator found the plan inadequate or if the state declined to submit a plan, the Administrator ultimately was required to promulgate a federal plan for the state. 42 U.S.C. (Supp. I) 7410(c). Each SIP must include emission limitations for stationary pollution sources, schedules for compliance, and provisions for such additional methods of

pollution controls as are necessary. The Act also provides that each SIP must include measures designed to reduce pollution from motor vehicles, including automobile inspection and maintenance ("I/M") and other transportation control programs if necessary to insure attainment and maintenance of the national standards. 42 U.S.C. (Supp. I) 7410(a)(2)(B) and (G).

b. By 1976 it became apparent that many areas of the country had failed to attain the primary ambient air quality standards by the 1975 statutory deadline. A then-existing EPA regulation, 40 C.F.R. 51.18(b) (1976), on its face prohibited construction of any major source of pollution in any area in which the standards for any pollutant generated by the source were not being met. EPA modified this position by publication of an interpretive rule on December 16, 1976, construing that regulation to permit certain major sources of pollution to be put into operation in nonattainment areas in certain situations. 41 Fed. Reg. 55524-55530; 40 C.F.R. Part 51 (1979). Under the interpretive rule, known as the "emission offset" ruling, a new source was permitted if emissions from existing sources were to be reduced by an amount greater than the incremental increase in pollution from the new source, if the new source was held to the lowest achievable rate of emissions, and if the applicant for the permit owned no other source that violated the applicable SIP. EPA also requested the states to develop revised SIP strategies for areas in which the air quality standards were not being met. See 41 Fed. Reg. 28600 (1976).

c. In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Congress added a new Part D to Title I of the Act (42 U.S.C. (Supp. I) 7501-7508) applicable to "nonattainment areas" in

which national ambient air quality standards had not been met. Under Part D, the deadlines for attainment of the primary ambient air quality standards for most pollutants were extended until December 31, 1982. To ensure that these new deadlines would be met, Congress required states to submit substantially revised SIP's for nonattainment areas to EPA by January 1, 1979. Clean Air Act Amendments of 1977, Section 129(c), 42 U.S.C. (Supp. I) 7502 note. These revisions were to be approved by EPA by July 1, 1979 if they met the requirements of the Act.

Congress was also concerned that new sources not be constructed in nonattainment areas in a manner that would exacerbate existing violations while the states were formulating their revised plans. Therefore, Congress expressly ratified EPA's emission offset ruling, but directed that it be applied only until July 1, 1979. Section 129(a)(1) of the 1977 Amendments, 42 U.S.C. (Supp. I) 7502 note. For later periods, Congress required each state to include in its SIP, by August 1978,[1] a provision imposing a limited conditional moratorium on construction and modification of major stationary sources after July 1, 1979. The moratorium was to affect only sources that would emit 100 tons or more per year of a pollutant for which the national ambient air quality standard was being violated in a particular area, and it was to operate only until a revised SIP complying with the provisions of Part D was approved or promulgated by EPA. See 42 U.S.C. (Supp. I) 7410(a)(2)(I).

Widespread failure to attain air quality standards by 1975 for automobile exhaust pollutants, such as carbon monoxide and photochemical oxidants (ozone),

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[1] This date is established by Section 406(d)(2) of the 1977 Amendments, 42 U.S.C. (Supp. I) 7401 note.

posed a special problem. In 1977, Congress authorized EPA to grant limited extensions, until December 31, 1987, for meeting these two standards. 42 U.S.C. (Supp. I) 7502(a)(2). But to minimize the adverse health effects, Congress required any state that received an extension to include an enforceable I/M program in its revised SIP and to implement this program "as expeditiously as practicable," but no later than 1982. 42 U.S.C. (Supp. I) 7502(b)(2), 7502 (b)(10) and 7502(b)(11)(B). See H.R. Rep. No. 95-294, 95th Cong., 1st Sess., 282 (1977).

Congress was aware that many states had yet to adopt transportation control measures, including I/M, and that this problem had generated considerable litigation. *See* H.R. Rep. No. 95-294, *supra*, at 286-291.[2] Prompted by suggestions in several of the relevant

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[2] In 1973, acting pursuant to a court order in *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973), the Administrator required states needing transportation control plans to amend their SIP's to include such plans. 38 Fed. Reg. 2194, 10851 (1973). When several states failed or refused to adopt these amendments, the Administrator promulgated federal transportation control plans for those states, including an inspection and maintenance program for motor vehicles, and he ordered the states to adopt implementing legislation. Several states, including California, challenged EPA's authority under the Clean Air Act and the Constitution to require the states, through threat of enforcement actions under 42 U.S.C. (Supp. I) 7413, to adopt transportation control measures. See, *e.g.*, *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975) (*Brown I*); *State of Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975); but see *Commonwealth of Pennsylvania* v. *EPA*, 500 F.2d 246 (3d Cir. 1974). These cases were vacated and remanded by this Court as moot after EPA represented that the federal regulations had to be modified to remove the requirement that the states adopt implementing laws. *EPA* v. *Brown*, 431 U.S. 99

court decisions that withholding of federal funds would be both a useful and constitutionally permissible incentive for state participation,[3] Congress conditioned certain federal grants upon a state's satisfactory participation in the SIP program. Under 42 U.S.C. (Supp. I) 7506(a), where transportation control measures are needed, the revised SIP has not been approved by July 1, 1979, and reasonable efforts to submit such a SIP have not been made, EPA "shall not approve" grants otherwise authorized by the Clean Air Act and the Secretary of Transportation shall not award certain highway grants. In addition, under 42 U.S.C. (Supp. I) 7616(b), grants for sewage treatment works may be withheld or restricted if the state does not have an approved SIP that accounts for the increases in air pollution caused by the sewage works or the residential, commercial, or vehicular growth made possible by the sewage works.

d. Many states that had nonattainment areas did not submit revised SIP's to EPA by July 1, 1979. Some of these states had not adopted special provisions in their existing SIP's imposing the required construction moratorium in these circumstances.[4] There-

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(1977). Thereafter, the court of appeals for the Ninth Circuit again held EPA lacked statutory authority under the Act to bring enforcement actions against the states for failure to implement the federally promulgated SIP requirements involved in that case. *Brown* v. *EPA*, 566 F.2d 665 (9th Cir. 1977) (*Brown II*).

[3] See, *e.g.*, *Brown I*, *supra*, 521 F.2d at 840; *State of Maryland* v. *EPA*, *supra*, 530 F.2d at 228.

[4] On the other hand, more general language having that effect had been adopted by, or promulgated for, the states. 40 C.F.R. 51.18(b) required every SIP to include provisions barring construction of new sources or modification of exist-

fore, acting pursuant to 42 U.S.C. (Supp. I) 7410(c) and 7601, the Administrator promulgated a regulation on July 2, 1979 which had the effect of inserting, or reaffirming the operation of, the required interim moratorium in the SIP of each noncomplying state (Pet. App. A-112 to A-113). This regulation was described as an "interpretive rule," stating the view of the Administrator that the 1977 Amendments, by adding 42 U.S.C. (Supp. I) 7410(a)(2)(I), themselves required imposition of the temporary moratorium and that he lacked any discretion in the matter (Pet. App. A-106 to A-107). No petition for review of this regulation was filed in the court of appeals.

2. California did not submit SIP revisions for *any* of its air pollution control districts by July 1, 1979. A construction moratorium therefore was activated in its SIP by the regulation promulgated on July 2, 1979. In the succeeding months California submitted SIP revisions to EPA covering all regions of the State encompassing nonattainment areas. EPA has proposed action on each of the submitted plans. California requested an extension of the December 31,

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ing sources where such acts would "interfere with attainment or maintenance of a national standard." In reviewing or promulgating state SIP's, EPA inserted the necessary provisions wherever they were lacking. 40 C.F.R. 52.10. California's SIP contained such provisions. See 40 C.F.R. 52.233(d), (f)(2), (f)(3)(ii), (g)(2), and (g)(3). These provisions, effective prior to July 1, 1979, seemingly implemented a construction moratorium. They did not have that effect, however, so long as the EPA's emission offset ruling was in effect. See pages 2-3, *supra*. Once the emission offset ruling was suspended on July 1, 1979, as Congress had directed (see page 3, *supra*), these provisions again became effective as a construction moratorium. EPA promulgated the July 2, 1979, moratorium regulation at issue in this case partially in order to make this effect clear to the public.

1982, deadline for attainment of primary air quality standards for carbon monoxide and ozone for six regions, including major metropolitan nonattainment areas, pursuant to 42 U.S.C. (Supp. I) 7502(a). Revised SIP's for these areas must therefore include an I/M plan among the measures prescribed for control of these pollutants. 42 U.S.C. (Supp. I) 7502(b)(11)(B). EPA has tentatively proposed to disapprove the ozone and carbon monoxide provisions of the revised SIP's submitted for these areas because they do not certify the existence of legal authority necessary to implement an I/M program, as required by 42 U.S.C. (Supp. I) 7502(b)(10).[5] To remedy this deficiency, the California legislature has considered bills to authorize an I/M program and is expected to resume consideration of I/M in the coming year.

Given the current impasse, EPA proposed on September 8, 1980 to invoke the restrictions on certain federal sewer and transportation grant programs, as required by 42 U.S.C. (Supp. I) 7506 (a) and 7616 (b). On December 12, 1980, EPA gave final notice that these restrictions were being imposed. 45 Fed. Reg. 81746.

3. By amended complaint filed on December 21, 1979, petitioners sought to compel the EPA Administrator to perform an allegedly nondiscretionary duty to promulgate a substitute revised SIP for the State of California. In their accompanying motion for a preliminary injunction, however, petitioners sought only to enjoin EPA from applying the limited

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[5] 44 Fed. Reg. 57109 (1979) (San Diego Air Basin); 45 Fed. Reg. 21271 (1980) (South Coast Air Basin); 45 Fed. Reg. 21282 (1980) (San Francisco Air Basin); 45 Fed. Reg. 58882 (1980) (Sacramento metropolitan area); 45 Fed. Reg. 58897 (1980) (Ventura County); and 45 Fed. Reg. 58912 (1980) (Fresno County).

construction moratorium described above to nonattainment areas in California and to enjoin EPA from "threatening" to utilize the funding restriction authority provided by the Act.[6]

The district court declined to issue a preliminary injunction. The district court held that exclusive jurisdiction of the challenge to the construction moratorium was vested by 42 U.S.C. (Supp. I) 7607(b) in the Court of Appeals for the District of Columbia Circuit. In the court's view, whether the moratorium was considered to be the promulgation of a regulation, the promulgation of a state implementation plan, or other final action by EPA, exclusive jurisdiction of this claim lay elsewhere (Pet. App. A-8 to A-16). The district court denied relief on the funding claim because it concluded that petitioners had "virtually no chance of succeeding on the merits" (Pet. App. A-19 to A-20). The court of appeals affirmed in a brief opinion approving the reasoning of the district court (Pet. App. A-25 to A-32).[7]

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[6] In alleging threatened fund termination, petitioners pointed only to a telegram from an EPA official to members of the California legislature (see Pet. App. A-153). The proposed restriction of funding noticed in the Federal Register (see page 7, *supra*) had yet to occur. The federal respondents accordingly suggested that this aspect of the claim was not ripe for adjudication. Given the December 11 notice cited in the text, we no longer press the ripeness claim.

[7] A motion for an injunction pending ruling on a petition for rehearing was denied on September 15, 1980. Petitioners' motion for an injunction pending filing of a petition for a writ of certiorari was denied by the court of appeals on October 16, 1980. Mr. Justice Rehnquist denied a similar application on October 22, 1980.

ARGUMENT

The petition for a writ of certiorari challenges only the denial of a motion for a preliminary injunction. The decision below does not conflict with any decision of this Court or any court of appeals, presents no issue of general importance, and is clearly correct. *Harrison* v. *PPG Industries, Inc.*, No. 78-1918 (May 27, 1980). Review by this Court accordingly is unwarranted.

1. a. The conclusion reached by the court below that EPA's action in instituting the construction moratorium is reviewable only in the court of appeals is clearly correct.[8] The United States Court of Appeals for the District of Columbia Circuit has exclusive original jurisdiction to review, *inter alia*, "any * * * nationally applicable regulations promulgated or final action taken, by the Administrator." The court of appeals for the circuit in which a given state is located has exclusive jurisdiction to review approval or promulgation of "an implementation plan * * * or any other final action of the Administrator * * * which is locally or regionally applicable." 42 U.S.C. (Supp. I) 7607(b)(1), 7607(e). However, even such locally and regionally applicable actions are made reviewable only in the Court of Appeals for the District of Columbia Circuit if the Administrator certifies the nationwide scope or effect of the decision embodied therein. *Ibid.*

In this action petitioners seek review of the July 2, 1979 EPA regulation that had the effect of inserting or clarifying provisions in all state implementa-

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[8] Petitioners' suggestion (Pet. 10) that the district court has inherent "traditional equity jurisdiction" not resting on any statutory grant of jurisdiction, is plainly incorrect. *Victory Carriers* v. *Law*, 404 U.S. 202, 212 (1971).

tion plans, including California's. The regulation expressly states the Administrator's determination of nationwide applicability (Pet. App. A-112), thereby giving clear notice that the proper forum for judicial review is in the District of Columbia Circuit. Petitioners' contention to the contrary rests upon the fact that the July 2, 1979 regulation was classified as an "interpretive rule" by EPA, and was accordingly promulgated without notice and comment under the Administrative Procedure Act, 5 U.S.C. 553(b). But nothing in 42 U.S.C. (Supp. I) 7607(b)(1) excludes interpretive regulations from its provision for exclusive jurisdiction in the court of appeals.

Contrary to petitioners' suggestion (Pet. 10-12), the decision below does not conflict with *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), or *Morton* v. *Ruiz*, 415 U.S. 199 (1974). Neither case addresses the proper forum for judicial review of an interpretive rule. Moreover, the decision below concerning the proper forum for judicial review in no sense "gave substantive effect to an *interpretive rule*" (Pet. 10, 12). Petitioners' claim that EPA impermissibly employed an interpretive rule to establish substantive law could have been raised in a timely petition for review of the July 2, 1979, regulation, but petitioners did not pursue that course. Accordingly, that question is not properly presented here. *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 n.15 (1980).[9]

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[9] Petitioners' assertion is, in any event, incorrect. The moratorium regulation simply announced and implemented the combined effect of Section 129(a) of the 1977 Clean Air Act Amendments and 42 U.S.C. (Supp. I) 7410(a)(2)(I), which cancelled the earlier "emission offset" interpretive rule on July 1, 1979 and mandated the construction moratorium. See pages 2-4, 6-7, *supra*. Nor is there any necessary incon-

c. In any event, the promulgation of the construction limitation on July 2, 1979, was "final action" by the Administrator reviewable only in the court of appeals. 42 U.S.C. (Supp. I) 7607(b)(1). The decision in *Harrison* v. *PPG Industries, Inc.*, *supra*, rejects all arguments that the reach of this jurisdictional provision is narrower than its plain language indicates. Slip op. 8-13. The Court there held, agreeing with the EPA petitioners (*id.* at 10; emphasis added):

> that the phrase, "any other final action" * * * must be construed to mean exactly what it says, namely, *any other* final action.

Petitioners acknowledge (Pet. 10) that "the announcement of the construction ban may have been a 'final action,' " but assert that it escapes the exclusive jurisdiction of the court of appeals under 42 U.S.C. 7607(b)(1) because implementation of the moratorium entails the application of the moratorium regulation to individual permit applications. This contention is unfounded. There is simply no indication, and petitioners do not suggest, that EPA's action is in any way informal or less than definitive.[10]

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sistency between the label "interpretive" and the fact that a regulation affects individuals and businesses. See *Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 876, 876 n.153 (D.C. Cir. 1979).

[10] Contrary to petitioners' suggestion (Pet. 9-10), the moratorium regulation does not allow any discretion to the state agency to issue a permit when application is made to construct a new or modified major source of a pollutant for which the projected site does not meet national standards. While conditional permits may be issued for such sources during the moratorium, these permits must prohibit all construction until a revised SIP is approved or promulgated. See 44 Fed. Reg. 37680 (1979).

It is accordingly final for purposes of judicial review. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151 (1967). It is well established that definitive agency regulations and rulings are final for judicial review purposes, even where implementation has yet to occur and may entail further proceedings. *Id.* at 149-151; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 193-200 (1956); *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *Columbia System* v. *United States*, 316 U.S. 407, 418-419 (1942).[11] In any event, if petitioners were correct in suggesting that the construction moratorium does not represent final agency action reviewable in the court of appeals under 42 U.S.C. (Supp. I) 7607(b)(1), the district court was equally lacking in jurisdiction, for reviewable final agency action under the Administrative Procedure Act would then be lacking. *Harrison* v. *PPG Industries, Inc.*, *supra*, slip op. 8, 10. Accordingly, on any view of the law, the district court was without jurisdiction of petitioners' challenge to the construction limitation.

2. Petitioners attempt to buttress their jurisdictional argument by asserting (Pet. 11-12) that EPA has altered its position as to the nature and effect of the July 2, 1979 regulation. This effort is unavailing. The notice of promulgation of the moratorium explicitly stated the Administrator's position that the 1977 Clean Air Act Amendments made imposition of the construction limitation "automatic and mandatory" (Pet. App. A-106); that the moratorium regu-

[11] The ruling deemed final in *Harrison*, that PPG Industries' proposed facility was subject to a particular set of new source performance standards, left open the question whether the facility met those standards. Petitioners' argument therefore challenges the result in *Harrison*.

lation activated the construction restrictions already present in most states' SIP's (*ibid.*); that moratorium provisions were added to any SIP's deficient or ambiguous in this regard (*id.* at A-107); and that, for purposes of judicial review, the moratorium "rule" was "nationally applicable and is based on determinations of nationwide scope and effect" (*id.* at A-112). EPA's consistent position therefore supports the jurisdictional ruling below.

3.a. In view of the jurisdictional defect infecting petitioners' claim, there is no need to consider the constitutional issues they would raise (Pet. 5-8). These claims are, in any event, entirely unfounded. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), is inapposite here, for the construction moratorium does not entail regulation of any state functions at all, much less "functions essential to separate and independent existence" of the state. Compare, *National League of Cities*, *supra*, 426 U.S. at 845, 852. What is challenged here is simply direct regulation of private commerce authorized by the Commerce Clause. See *National League of Cities*, 426 U.S. at 845. Such "direct federal regulation by definition involves no intrusion on state sovereignty whatsoever." *District of Columbia* v. *Train*, 521 F.2d 971, 994 n.27 (D.C. Cir. 1975), vacated and remanded *sub nom. EPA* v. *Brown*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827, 840 (9th Cir. 1975), vacated and remanded, 431 U.S. 99 (1977), opinion on remand, 566 F.2d 665 (9th Cir. 1977) (see note 2, *supra*).[12] The courts of appeals have uniformly sus-

[12] The *Brown* decisions of the court of appeals do not support petitioners' contentions. In the *Brown* cases, EPA claimed the authority to direct the state to take particular action and adopt particular state laws, and to enforce this

tained federal laws, passed under the Commerce Clause power, which, like the Clean Air Act, allow the states the choice as to whether to participate in a federal regulatory scheme. See, *e.g.*, *Friends of the Earth* v. *Carey*, 552 F.2d 25, 36-39 (2d Cir.), cert. denied, 434 U.S. 902 (1977); *Sierra Club* v. *EPA*, 540 F.2d 1114, 1140 (D.C. Cir. 1976), cert. denied, 430 U.S. 959 (1977). See also, *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 84 n.27 (1978). Petitioners' Tenth Amendment claim is therefore devoid of merit.[13]

b. Petitioners' arguments concerning funding limitations may be raised in a petition for review of whatever limitations the Administrator ultimately applies to California's non-attainment areas and therefore should not be considered here. In any case, the district court plainly did not abuse its discretion in denying a preliminary injunction based on a determination that petitioners have "virtually no chance of succeeding on the merits" of their constitutional claim. This Court repeatedly has upheld the constitutionality of statutes conditioning availability of federal grant funds upon state participation in related regulatory programs. *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143-144 (1947); *Steward*

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authority in the courts through injunctive relief, imposition of a receivership on state functions, and contempt citations against state officials, including the governor. Here, EPA has done none of these things, and asserts no power to require the State to act at all. EPA has not, in fact, *required* California to do anything.

[13] Petitioners' reliance (Pet. 7) on the Guaranty Clause is equally unfounded. See *Baker* v. *Carr*, 369 U.S. 186, 224 (1962).

Machine Co. v. *Davis*, 301 U.S. 548, 589-591 (1937); see also *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 22 (plurality opinion).

c. Petitioners' repeated claims (Pet. 6-7, 13) that the Administrator has breached a mandatory duty to promulgate a substitute SIP for California on July 1, 1979, is not properly presented to this Court. Petitioners deliberately excluded this contention from the scope of their motion for a preliminary injunction (Pet. App. A-7), and this question was not addressed by either court below. Petitioners' motion for summary judgment on this point has been presented to the district court and is now awaiting decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANGUS MACBETH
Acting Assistant Attorney General

DIRK D. SNEL
JOSHUA I. SCHWARTZ
Attorneys

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